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DONOGHUE *v.* STEVENSON IN RETROSPECT *

Introductory

Twenty-five years ago, the House of Lords reserved judgment in an appeal from the Court of Session. The arguments of counsel had lasted for two days. Six months later, by a majority of three to two, the House allowed the appeal. Between the headnote and the formal order lie eighty-one pages of the Appeal Cases, which by common consent are recognised to contain some of the most interesting and important speeches ever delivered in the history of the common law. After a quarter of a century there is a safe opportunity for a review and evaluation of the decision and its development during the subsequent years. There are some preliminary difficulties. There have been curious uncertainties about two elements of the case—its title and its facts. The full title in the *Law Reports* reads "*M'Alister* (*or Donoghue*) (*Pauper*) v. *Stevenson*." The terminology of Scots law is a perpetual source of fascination to all who live south of the Tweed. It appears to be the Scots practice to name a married woman in legal documents by her maiden as well as by her married surname "with the (infelicitous) disjunctive 'or' interposed." [1] Despite this, it is her married surname alone which is used in citing the case: *Donoghue* v. *Stevenson* is the correct form. Secondly, there has been some dispute about the facts. Now the issue before all the courts was a purely legal one: as Lord Atkin said, it was "Do the averments made by the pursuer in her pleadings, if true, disclose a cause of action?" [2] or, in the perhaps more appropriate phraseology of Lord Thankerton,[3] "the only question in

* An abbreviated version of this paper was delivered as a lecture at University College, London, on December 5, 1955.

1 Macmillan, (1933) 49 L.Q.R. 1; (1945) 61 L.Q.R. 109. As R. M. W. has said ((1933) 49 L.Q.R. 333), the practice "creates an impression in some quarters that the person so named is either a jailbird or a betting tout."

2 [1932] A.C. 562.

3 *Ibid.*, at 601.

this appeal is whether, taking the appellant's averments *pro veritate*, they disclose a case relevant in law so as to entitle her to have them remitted for proof." The House, as we have seen, answered this question in the affirmative. Now the pursuer's averments were that she had entered a café in Paisley occupied by one Minchella; and that a friend who accompanied her bought from Minchella some refreshment for both of them. The refreshment consisted of two slabs of ice-cream, each of which was placed in a tumbler, and over which was then poured part of the contents of a bottle of ginger-beer. The ginger-beer had been manufactured by the defender Stevenson, and bought from him by Minchella. It was contained in a bottle made of dark opaque glass. When the pursuer had partly finished the confection, her friend attempted to replenish her glass by pouring into it the remains of the contents of the bottle. As she was doing this a decomposed snail floated out. The appellant averred that as a result of the nauseating sight of the snail and the impurities in the ginger-beer which she had already consumed, she had suffered from shock and severe gastro-enteritis. Now there has been a persistent rumour (which has found support even in the Court of Appeal[4]) that when the case went back to the Court of Session "to do as shall be just and consistent with this judgment" it was discovered that there never had been a snail in the bottle at all. This is not so. The truth is that the issue of fact was never decided: the defender died before proof and the pursuer in consequence compromised the action and received £100 in settlement of her claim.[5]

A few more introductory words may be allowed to describe the members of the tribunal which decided a case so remarkable in the history of the law, not only because the presence of particular judges at decisive moments has always been recognised as a significant factor in legal development, but also because the composition of the House on this occasion has been the subject of remark. The three members of the House who were in favour of allowing the appeal were Lords Atkin, Macmillan and Thankerton. Those who dissented were Lords Buckmaster and Tomlin. Of these, all except Lord Buckmaster, who had been Lord Chancellor for the eighteen months of Asquith's Coalition ministry of 1915–1916, had been appointed Law Lords within the preceding five years. Lord Atkin comes first to mind. Although born in Australia and educated in Great Britain, he came from a well-known Co. Cork family—like that other master of the common

[4] *Adler* v. *Dickson* [1954] 1 W.L.R. 1482, at 1483, *per* Jenkins L.J.

[5] On the authority of Lord Macmillan, this statement. See the addendum pasted into the Institute for Advanced Legal Studies' copy of Mackinnon, *The Statute Book* (Holdsworth Club: University of Birmingham, 1942); Macmillan, *A Man of Law's Tale*, 152; Ashton-Cross (1955) 71 L.Q.R. 472; (1955) 220 L.T. 291.

law, Sir James Shaw Willes. With Lords Macmillan and Thankerton, he formed what Mr. Landon has called "the Celtic majority," [6] although unlike them, he had had previous judicial experience, having been a member of the High Court or the Court of Appeal for nineteen years. Lords Thankerton and Macmillan had only recently been appointed; both had held the office of Lord Advocate, and the former was a son of the famous Lord Watson. The latter has related how the final decision depended on his vote: he was obliged to support one or the other pair of his senior colleagues.[7] Lord Tomlin was an eminent Chancery judge who had been promoted to the House of Lords from the High Court—a course for which at that time there were only two precedents. Lord Macmillan has recorded an impression of Tomlin's "intellectual charm," [8] and Lord Simonds has said that "It is not seemly to weigh the pronouncements of living judges, but it is, I think, permissible to say that the opinion of few, if any, judges of the past command greater respect than those of Lord Tomlin." [9] Of Lord Buckmaster, one who had been a distinguished judicial colleague for many years, Lord Dunedin replied to the question "Whom do you regard as the greatest colleague you have had?" in these words: "You will be surprised when I tell you—Buckmaster; I have not and I never have had any sympathy with Buckmaster's political ideas and performances and I think him to be a sentimentalist—unless he is sitting on his arse on the bench; there he is one of the most learned, one of the most acute, and the fairest judge I ever sat with; and he will leave much in the books." [10] His dissenting speech is written in terms of passion and even sarcasm unusual in the law reports; he saw how far the majority were prepared to go and made his dissent plain. Pollock said of Lord Tomlin and Lord Buckmaster that they were "the last men one would have suspected

[6] (1942) 58 L.Q.R. 181. *Cf.* (1945) 61 L.Q.R. 206 ("Celtic ideology"). Oddly enough, apart from Trinity, Oxford, the only place in which this has been produced as a ground for doubting the authority of the decision has been the Irish High Court: *Kirby* v. *Burke* [1944] I.R. 207.

[7] *A Man of Law's Tale*, 151.

[8] *Ibid.*, 151. See Lord Uthwatt's opinion in the *Dictionary of National Biography*, 1931–1940. Tomlin once said that in his youth the relationship of academic and practising lawyers could be thus summarised: "For the Dons are so hard on the judges, and the judges so rude to the Dons." "Happily," he said, "all that is a thing of the past": (1935) 51 L.Q.R. 568.

[9] *Government of India* v. *Taylor* [1955] A.C. 491, at 504. Although a former Fellow of Corpus Christi has stated that "A study of the academic record of those Oxonians who have risen to eminence in the profession since 1900 shows that the overwhelming majority of them have either by-passed the new Honours School (of Jurisprudence) altogether or else have taken it more or less contemptuously in their stride while they concentrated on getting a First in one of the traditional Schools, usually in "Greats" (Binchy, *The Law and the Universities* (1949) 38 Studies 259), it is interesting to note that in the Class Lists for 1889 Mr. T. J. C. Tomlin of New College appears among the Firsts in Jurisprudence, while Mr. J. R. Atkin of Magdalen was placed in the Second Class in "Greats."

[10] See the notice of Lord Buckmaster by Mr. Geoffrey Russell in the *Dictionary of National Biography*, 1931–1940.

of timidity, but in this case they are less courageous than Lord Birkenhead would surely have been if he were still with us. Parts of their judgments read as if they had forgotten they were judging in a court of last resort." [11]

Few (if any) decisions in the history of the common law have evoked so much discussion. At times this has been conducted with a vigour reminiscent of the controversy which followed Lord Mansfield's unhappy attempt in *Perrin* v. *Blake* to elucidate the *mysterium tremendum* of the Rule in *Shelley's* case. Supporters of the decision have always emphasised its importance. So Dean Wright has assured us that it is "the most important single judgment in torts in the past twenty-five years," [12] and Professor Seavey has said that the case contains "a complete authoritative statement of the fundamental theory of negligence." [13] Lesser men (perhaps those whom the caustic Beven had in mind when he referred to those who approved of Lord Esher's judgment in *Heaven* v. *Pender* as "some folk of secondary or no authority")[14] have sometimes written in terms which suggest that any decision before or after 1932 which might be construed as inconsistent with *Donoghue* v. *Stevenson* can be explained only on the ground of the existence of ignorance, obstinacy, or malice on the judicial bench.

It is only to be expected that statements like these should have produced a reaction. It is perhaps hardly surprising that Mr. Landon should once have committed himself to the view that "the duty to be careful exists only where the wisdom of our ancestors has decreed that it should exist" [15]; but *Donoghue* v. *Stevenson* must be the only decision of the House of Lords the citation of which has moved one puisne judge to declare that he would not extend the case "one inch," [16] and has provoked another to profanity.[17] The hostility which greeted the decision is, however, also explicable on the grounds other than the reaction natural to those who see an attempt to expand a principle beyond what they believe to be its proper sphere of operation. First, the majority did appeal to social convenience and policy as one of the justifications for their decision: "the categories of negligence are never closed." This is an argument which has always been somewhat

11 "The Snail in the Bottle and Thereafter" (1933) 49 L.Q.R. 22. And Denning L.J. has since described them (*Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 163, at 178) as "timorous souls who were fearful of allowing a new cause of action" as contrasted with "the bold spirits who were ready to allow it if justice so required."

12 "The Law of Torts: 1923–1947" (1948) 26 Can.Bar Rev. 46, 61.

13 *Candler* v. *Crane, Christmas & Co.* (1951) 67 L.Q.R. 466, 470–471.

14 *Negligence*, i, 205.

15 (1941) 57 L.Q.R. 183. He is less definite in the 15th (1951) edition of Pollock on *Torts*.

16 *Barnett* v. *Packer* [1940] 3 All E.R. 575, *per* Singleton J.

17 See the strange outburst of Glyn-Jones J. in *Cairns* v. *St. Marylebone B. C.* [1954] *The Times*, December 8.

suspect in England. "My brother Atkins said, the common law complied with the genius of the nation; I do not understand the argument. Does the common law change? Are we to judge of the changes of the genius of the nation? Whither may general notions carry us at this rate?": so spoke the authentic spirit of the common law through the mouth of North L.C.J. nearly 300 years ago.[18] Secondly, attempts to state in simple and comprehensible language the fundamental principles of the common law, to rationalise a host of single instances, have always been met with hostility. It is not easy to explain why a legal system which in its law of real property displays some of the most intricate concepts ever conceived in the human mind, should show itself so hostile to speculative analysis. But so it is: warnings against too ready a reliance on what is called "philosophy" or "logic" are common enough in the books. Yet often these terms are used in a sense which is either out of date or positively wrong. The story of how Lord Haldane's Hegelian arguments produced intellectual paralysis in the House of Lords in the *Free Church of Scotland* case has made so deep an impression that most lawyers have thought of "philosophy" as equivalent to metaphysics, as if all the British empiricists from Locke down to the flourishing school of linguistic analysis of our own day had written in vain. Fortunately it has recently been realised that one may be a philosopher without being committed to the view that there exist transcendental concepts of universal validity which (if one were only clever enough to discover their true essence) provide a criterion for judging the rightness of all conduct.[19]

The Ratio Decidendi of the Case

The ascertainment of the *ratio decidendi* of any decision given by an appellate court in the course of which several judgments have been delivered is notoriously a difficult task. One problem may be disposed of at once. It was agreed between counsel and stated by the judges in all the courts that the relevant principles of Scots and English law were identical. Now it has always been assumed that in such a case a decision of the House of Lords on an appeal from the Court of Session is binding on all courts in the English hierarchy.[20] Those who adhere to a mechanical test for distinguishing *ratio decidendi* from *obiter dictum* would no doubt be obliged to deny this, for in a Scots appeal the only issue in the

18 *Barnardiston* v. *Soame* (1674) 6 How.St.Tr. 1063, at 1115.

19 Various academic writings have recently made us familiar with the ideas of those interested in linguistic analysis. And a law Lord has said that he was using the term philosopher "in no disparaging sense. For what is a philosopher but one who, *inter alia*, reasons severely and with precision": *Stapley* v. *Gypsum Mines, Ltd.* [1954] A.C. 663, at 687, *per* Lord Asquith of Bishopstone.

20 See Lord Porter in *Heyman* v. *Darwins, Ltd.* [1942] A.C. 356, at 401. *Cf.* Williams (1942) 6 M.L.R. 80.

case is Scots law, and any statement as to the meaning or effect of English law must necessarily be *obiter*.[21] It seems safer to say that the principles stated in *Donoghue* v. *Stevenson* have been universally recognised to be authoritative in England as well as in Scotland,[22] and to turn to the more difficult task of discovering what those principles are. Lord Wright has appropriately referred to the decision to illustrate the proposition that "Notwithstanding all the apparatus of authority, the judge has nearly always some degree of choice. . . . The higher the court, the less is the decisive weight of authority and the freer the choice."[23] On the assumption that it is possible to draw from a given decision as many general propositions as there are possible combinations of distinguishable facts, Professor Stone has observed that the decision could be restricted to mean that there is a duty not to sell opaque bottles of beverage containing dead snails to Scots widows, or expanded to mean that there is a duty not to distribute defective objects of any kind whatsoever which cause damage of any kind to any person into whose hands the object may come.[24]

Now as between the parties themselves there can be no doubt that the case decided that if the pursuer could prove that which she averred she would have a good cause of action. So the case decided at least something to do with the duty owed by a supplier of chattels. There are some authorities who would deny that the case decided any more. This appears to have been the view taken by the experienced reporter who framed the "somewhat conservatively worded headnote,"[25] and in several later cases we find clear statements that the *ratio decidendi* is so confined.[26] Nevertheless there has been a persistent belief that the case is authority for something more. Lord Normand has put this most clearly. "The argument for the defender was that there were certain relationships, such as physical proximity or contact, which alone give rise to duties in the law of quasi-delict or tort, and that the relationship between the pursuer and defender was not one of them." The

21 The authorities on conflict of laws seem to have developed some such doctrine: Cheshire, *Private International Law*, 88–89. But to one interested in torts "the realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorise about mysterious matters in a strange and incomprehensible jargon": Prosser, *Selected Topics*, 89.

22 Walker, "Some Characteristics of Scots Law" (1955) 18 M.L.R. 321, is highly critical of the influence of the House of Lords on Scots law. But he does not contend that it would have been advantageous to that system if the decision of the Court of Session in *Donoghue* v. *Stevenson* had stood unreversed.

23 *Legal Essays and Addresses*, xxv.

24 *Province and Function of Law*, 187–188. See too Hughes, *Jurisprudence*, 232–233.

25 The phrase is Asquith L.J.'s in *Candler's Case* [1951] 2 K.B. 343.

26 *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, 102; *Howard* v. *Walker* [1947] K.B. 860, 863; *Marshall* v. *Cellactite & British Uralite, Ltd.* (1947) 63 T.L.R. 456, 457; *Travers* v. *Gloucester Corporation* [1947] K.B. 71; *Grossman* v. *The King* [1952] 2 D.L.R. 241, 255–256; *McPhail* v. *Lanarkshire C. C.*, 1951 S.C. 301.

decision was that the categories of negligence are not closed and that duties of care are owed, not only to physical neighbours, but to anyone who is "my neighbour" in the wider sense, as stated by Lord Atkin, "of a person . . . 'so closely and directly affected by my act that I ought reasonably to have (him) in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'" [27] This is the neighbour principle so familiar to us all. Our inquiry at the moment is limited to discovering how far this principle can fairly be said to form a, or part of the, *ratio decidendi* of the judgment of (i) Lord Atkin himself, (ii) the majority of the House of Lords.

(i) A fair reading of the whole judgment in its context, not concentrating on this or that passage to the exclusion of others, makes it plain that Lord Atkin intended to show (a) that the liability of a supplier of chattels is not limited to cases in which the parties are in physical proximity to each other: a duty of care may exist even in the absence of spatial or temporal "proximity" if there is a probability of harm inherent in the relationship of the parties, and the facts of the case before him provided a model for such a relationship [28]; (b) that "there must be, and is, some general conception of relations giving a rise to a duty of care, of which the particular cases found in the books are but instances." He then states the "neighbour principle" in the term which we have already cited, and concludes that this "appears to me to be the doctrine of *Heaven* v. *Pender* as laid down by Lord Esher when it is limited by the notion of proximity introduced by Lord Esher himself and A. L. Smith L.J. in *Le Lievre* v. *Gould*." It is impracticable to draw a clear line anywhere between the two parts of the judgment. The reasoning is everywhere dovetailed and interlocked. The neighbour principle is part of the *ratio decidendi* of Lord Atkin's judgment, for it is a step in the argument, a vital link in the chain of reasoning which led to the formulation of the principle about manufacturers'

27 *London Graving Dock Co.* v. *Horton* [1951] A.C. 737, at 757. It is convenient to recall here that the passage cited from Lord Atkin's speech is immediately preceded by this: "The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who. then, in law is my neighbour? The answer seems to be persons . . ."

28 *Cf. Travers* v. *Gloucester Corporation* [1947] K.B. 71; *Nova Mink, Ltd.* v. *Trans-Canada Airlines* [1951] 2 D.L.R. 241. As Pollock remarked ((1933) 49 L.Q.R.), "talk about 'proximity'—a kind of fictitious poor relation of 'privity,' a notion which belongs to the law of contract and is wholly out of place here—is to be deprecated." This has the support of the Judicial Committee: *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, 104. *Bourhill* v. *Young* [1943] A.C. 92 shows that geographical "proximity" is not enough to establish liability.

liability.[29] The significance to be attached to the neighbour principle will be discussed in detail later: it is enough to say here that it has been accepted by many as showing that *Donoghue* v. *Stevenson* provides a general criterion of liability—at least in the tort of negligence, and possibly throughout the whole field of tort. So that when Dean Wright tells us that "Whether that decision will be expanded into a broad revolutionary principle or confined to a narrow category is one of the most important decisions that modern courts must make"[30] it seems clear that he is not referring only to the part of the decision which deals with manufacturers' liability. Even those who, like Mr. Landon, say that "all that *Donoghue* v. *Stevenson* has done is to add a new category of negligence to our law"[31] have been obliged to meet the argument that at least one law lord attempted to state the principle upon which such an addition had been made.

(ii) Whatever the status of the "neighbour principle" in Lord Atkin's own judgment, it hardly seems possible to say that it forms part of the *ratio decidendi* of the decision, for the two other members of the majority seem to have been careful to avoid expressing their concurrence with it.[32] Lord Thankerton said that he agreed with Lord Atkin's speech, but it is the proper inference from the context of this remark that his agreement was confined to that part of the speech which analyses the English cases on manufacturers' liability. In any case, he expressly said that it was impossible to catalogue finally the circumstances in which a duty of care might arise.[33] Lord Macmillan recognised that new duties might be created—"the categories of negligence are never closed"[34]—but maintained a cautious silence about the principle or principles upon which this might be done.[35]

Two further points may be made. First, it is preferable to refer to this particular part of the judgment as enshrining a "principle" and not a "rule." The former word connotes a degree of flexibility and adaptability which the latter does not. "A

[29] Even if it be regarded as dictum, the carefully considered and often-approved utterances of a law Lord are in no way to be equated to the (perhaps ill-reported) remarks of a puisne judge made at *nisi prius*. There are dicta and dicta.

[30] *Cases on the Law of Torts*, 258.

[31] Pollock, *Torts*, 327n. *Cf.* the comment of Scott L.J. in *Haseldine* v. *Daw* [1941] 2 K.B. 343, 362.

[32] See this point fully developed by Mr. Landon: Pollock, *Torts*, 331–332.

[33] [1932] A.C. at 603.

[34] Upon which Mr. Landon comments (Pollock, *Torts*, 332): "But Lord Atkin's definition sought to close them."

[35] "In other words, what Lord Macmillan envisaged was the addition of another slab to the existing edifice, not a systematic reconstruction of the edifice on a single logical plan": *Candler's Case* [1951] 2 K.B. at 192, *per* Asquith L.J. Fifteen years later Lord Macmillan said that "Your Lordships' task in this House is to decide particular cases between litigants and your Lordships are not called on to rationalise the law of England. That attractive, if perilous, field may well be left to other hands to cultivate": *Read* v. *J. Lyons & Co., Ltd.* [1947] A.C. at 175.

principle is the broad reason which lies at the base of a rule of law: it has not exhausted itself in giving birth to that particular rule but is still fertile." [36] If, as is generally believed, Lord Atkin's judgment forms a guide for the future as well as an appraisal of the past, it is best to describe it in a way which will enable us to use its potentialities to the utmost. Secondly, there seems to be little profit in an attempt to discover the sources of the ideas expounded in the neighbour principle. Lord Atkin himself refers expressly to Lord Esher and indirectly to the lawyer's question to Jesus which inspired the story of the Good Samaritan. It will be remembered how skilfully St. Luke (x, 25–35) tells the story: at the end of it Jesus puts the lawyer's own question to him, and he is obliged to answer in the words "He that shewed mercy on him." [37] Professor Stone [38] has seen a connection with Stammler. It is permissible to wonder whether the works of that particular *savant* have ever been seen on the bookshelves of a law Lord.

The conclusion is that there are four propositions for which the case commonly is (or can be) cited as authority: (1) That negligence is a distinct tort; (2) that the absence of privity of contract between plaintiff and defendant does not preclude liability in tort; (3) that manufacturers of products owe a duty of care to the ultimate consumer or user; and (4) that the criterion of the existence of a duty in the law of negligence (or perhaps in any part of the law of tort) is whether the defendant ought reasonably to have foreseen that his acts or omissions would be likely to result in damage to the plaintiff. Of these, only the second and third, and possibly the first, can truly be said to form part of the *ratio decidendi* of the decision. The fourth proposition, although perhaps the most commonly cited and in many ways the most significant, cannot properly be regarded a part of the *ratio decidendi* of the decision. No amount of posthumous citation can of itself transfer with retrospective effect a proposition from the status of *obiter dictum* to that of *ratio decidendi*; no doubt it will serve to magnify greatly the interest and importance of the case, but that is another matter.

Negligence a Distinct Tort

Winfield has explained very clearly how down to 1932 there was some doubt whether negligence was a separate tort, or merely a mode in which some other nominate torts might be committed.[39] But nobody since that date seems to have questioned Lord Wright's

[36] Paton, *Jurisprudence*, 176. Would it not be more helpful if we made a practice of talking about "the principle in *Rylands* v. *Fletcher*"?

[37] "'Thou shall love thy neighbour as thyself' is not part of our law at all": *Bowman* v. *Secular Society, Ltd.* [1917] A.C. 406, at 464, *per* Lord Sumner. In any case, it should be noted that the Christian obligation is to love one's neighbour as oneself, not better than oneself: Prümmer, *Manuale Theologiae Moralis*, Vol. i, 418–420.

[38] *Province and Function of Law*, 323–324.

[39] *Tort*, 6th ed., § 12.

statement that the decision of the House of Lords in *Donoghue* v. *Stevenson* "treats negligence, when there is a duty to take care, as a specific tort in itself, and not simply as an element in some more complex relationship or in some specialised brand of duty,"[40] or his pithy definition of the term as connoting "the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing."[41] The discussion has instead tended to be concentrated on the distinct but related problem of the scope and value of the concept of duty of care.

Privity of Contract and Liability in Tort

Here again Winfield has provided the authoritative explanation of how in the nineteenth century what has been conveniently called "the privity of contract fallacy" arose. The prevalent notion seems to have been that if A undertook a contractual obligation towards B, and his non-performance or misperformance of that obligation resulted in damage to C, then C could not sue A unless he could show that A had undertaken towards him that same obligation as he had assumed towards B. So, in relation to a contract of repair, Lord Abinger (very rightly) said in *Winterbottom* v. *Wright*, "Unless we confine the operation of such contracts as this to the parties who entered into them, the most absurd and outrageous consequences, to which I can see no limit, would ensue."[42] Enlightenment came only when it was realised that the duty (if any) which A owed to C in such circumstances was not only referable to a legal origin distinct from that of the contractual obligation assumed towards B but also might well be framed in different terms. The origin of such a duty lay in the law of tort and not in the law of contract, and its extent might be more or less onerous than that arising under the contract, more onerous, because it may well be that the manufacturer cannot exempt himself from liability to the consumer by the terms of his contract with the retailer,[43] although no doubt such an exemption may properly be bargained for as between the parties to a contract of sale or repair; less onerous, because the duty in such a case is, as we shall see, no higher than one to take reasonable care (as distinct from a warranty) that the article is sound. So the present position is that the privity of contract fallacy has disappeared.[44] The matter is completely open:

[40] *Grant* v. *Australian Knitting Mills* [1936] A.C. 85, 103.

[41] *Lochgelly Iron & Coal Co.* v. *M'Mullan* [1934] A.C. 1, 25.

[42] (1842) 10 M. & W. 109, at 114. This is all the plainer if (as in *Winterbottom* v. *Wright* itself) the obligation is thought of as being a warranty that care has been taken, as distinct from a duty to take reasonable care.

[43] *Per* Denning L.J. in *White* v. *John Warwick & Co., Ltd.* [1953] 1 W.L.R. 1285, 1294. If the consumer agreed to hold the retailer exempt from liability, it is doubtful whether the manufacturer could claim the benefit of such a contract: *Adler* v. *Dickson* [1955] 1 Q.B. 155.

[44] See the emphatic remarks of Denning L.J. in *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, 177; *Greene* v. *Chelsea B. C.* [1954] 2 Q.B. 127. Street, *Torts*, 220, says that *Donoghue* v. *Stevenson* establishes this "above all."

the absence of a contract between the parties is but one of the factors to be considered in determining whether liability in tort exists. It is also naturally necessary to avoid the converse fallacy of assuming that C will automatically have a good cause of action against A merely because A's failure to perform his contract with B has resulted in damage to C.

LIABILITY OF SUPPLIERS OF CHATTELS

Let us first see how the law in relation to the distribution of dangerous chattels stood before 1932. If the consumer were also the purchaser, there was of course liability in contract under section 14 of the Sale of Goods Act, 1893—although even here the consumer-purchaser would not be protected if the article was brought under a patent or trade name. So far as the law of tort was concerned, it was taken to be settled that there was liability to the ultimate user (i) if the transferor fraudulently misrepresented the chattel to be safe[45]; (ii) if the chattel belonged to the category of things dangerous *per se*—a category whose existence seems to be well established despite some criticism; (iii) if the chattel had to the knowledge of the transferor a defect rendering it dangerous to those who might reasonably be expected to use it.[46] The cases apparently went to the length of imposing liability on the transferor in his capacity as supplier, irrespective of whether he was also the manufacturer. The only case in which the vendor-manufacturer was held liable to an ultimate consumer with whom there was no contractual relationship, when there was no fraud, when he did not know the article to be dangerous, and when it did not belong to the category of things dangerous *per se*, was *George* v. *Skivington*,[47] in which the defendant was held responsible for the careless fabrication of his hairwash. This decision, "after a long and rough crossing, has limped into port"[48] for it was "fully restored"[49] by the judgments of Lord Atkin and Lord Macmillan in *Donoghue* v. *Stevenson*. The authorities to the contrary were distinguished blandly and skilfully.[50] From any point of view, this part of the decision alone is a remarkable example of what Pollock called judicial valour.[51] The balance of social interests was, as Lord

[45] *Langridge* v. *Levy* (1837) 2 M. & W. 519; 4 M. & W. 337. It must be taken that the defendant intended his representation to be communicated to the plaintiff, who he knew was going to use the gun: see Lord Atkin [1932] A.C. at 587.

[46] Salmond, *Torts*, 679–680.

[47] (1869) L.R. 5 Ex. 1.

[48] *Per* Asquith L.J. in *Candler's Case* [1951] 2 K.B. 164, at 190.

[49] *Ibid.*, at 182, *per* Denning L.J.

[50] Friedmann, *Legal Theory*, 325–326, finds Lord Atkin's discussion of the authorities "somewhat strained." Hughes, *Jurisprudence*, 232–233, says that "the form of the judgment is deductive: but in reality it is a perfect example of informed, creative induction."

[51] "Judicial Caution and Valour" (1929) 45 L.Q.R. 293. It is interesting to note that in another context in the same volume (45 L.Q.R. 422) Pollock

Atkin showed clearly, in favour of the imposition of liability. Thus, there are many objects of common household use—food, ointments, soap, cleaning powders—which are commonly known to be used by persons other than the actual purchaser—his servants and guests, for example—and a real social wrong would be committed if those persons were left remediless when injured by defectively manufactured objects of this kind. The fundamental problem which faced the majority was—as in most such cases—that of limitation of liability. How could a legal principle be framed which would afford protection at once to manufacturer and consumer? Here the majority were peculiarly fortunate in the nature of the facts presented for decision: they could hardly have been more favourable for the plaintiff. The fact that the bottle was opaque, stoppered, and sealed put an end to any argument which might have been raised by the manufacturer that the defect was due to the interference of some third party. The manufacturer had of his own accord brought himself into direct relationship with the consumer by intentionally excluding intermediate examination. As Lord Atkin said, "There can be no inspection by any purchaser and no reasonable preliminary examination by the consumer." [52] The famous words in which Lord Atkin summarised the obligation of the defendant in such cases are closely tailored to fit the facts of the case: "By Scots and English law alike a manufacturer of products which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." [53]

There is no need to review here in detail the way in which this principle has been developed during the last twenty-five years. It is common knowledge that the scope of the duty has been extended to include repairers, assemblers, and erectors, and that it is not confined to articles of food or drink—underwear, tombstones, lifts and motor-cars have all been included. Further, by perhaps the most daring extension of all, the category of those protected has been extended to persons who happen to be in physical proximity

wrote: "The chance of the House of Lords ever being induced to reverse this current of authority is matter of speculation. I think it would take a bold man to advise the experiment."

52 [1932] A.C. 562, at 582. *Cf.* Lord Thankerton at 603.

53 *Ibid.*, at 599. It will be recalled that Lord Atkin concluded with the words: "It is a proposition which I venture to say no one in Scotland or England who was not a lawyer would for one moment doubt. It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense." Lord Atkin noted with approval that his decision was in accord with American law—"The mouse had emerged from the ginger-beer bottle in the United States before it appeared in Scotland"—though it seems to an observer that American law, with its talk of "warranties," is more complex than ours.

to the article.[54] It is enough to say that there seems to have been no sign of the flood of worthless claims feared by the dissentient law Lords.[55] Indeed, as Dr. Goodhart has observed, dishonest claims may more easily be brought under section 14 of the Sale of Goods Act, 1893, under which it is unnecessary to prove negligence.[56] But something may be said of the development of the law on two disputed points—the existence of an opportunity for intermediate examination, and liability for defective gifts.

Intermediate examination

Does the mere existence of an opportunity for intermediate examination, even if it is not used, or indeed expected by anyone that it could or would be used, suffice to exonerate the defendant? In *Donoghue* v. *Stevenson* itself it was of course unnecessary for Lord Atkin to mention more than "a reasonable possibility," for the facts were of a kind to preclude examination by any person interposed between the manufacturers and the consumer, and to make it unlikely in the extreme that the consumer would discover the defect for himself. After an initial period of uncertainty,[57] it is now plain that the mere existence of such an opportunity will not exonerate the defendant: the proper question is whether he should reasonably have expected that the plaintiff would use the opportunity for inspection in such a way as to give him warning of the risk. In short, the decision did not depend on the bottle being stoppered and sealed. All this was clearly established by the judgment of Lord Wright in *Grant* v. *Australian Knitting Mills*.[58] The mere fact that there was a possibility that the underpants would be washed before use, so removing the excess sulphites which caused the plaintiff's dermatitis, was not enough: it was not contemplated that they would be washed. "If there was any doubt about the governing principle of *Donoghue* v. *Stevenson*, Lord Wright has dissipated it."[59] Indeed, as Finnemore J. has recently remarked, many reputable manufacturers might be insulted at the suggestion that inspection of their products was necessary

[54] *Stennett* v. *Hancock* [1939] 2 All E.R. 578.

[55] In particular, there has been no sign of suppliers of defective chattels which cause injury to numbers of persons being crushed under the weight of litigation, despite the forebodings of Byles *arguendo* in *Winterbottom* v. *Wright* ("anyone of the sufferers by such an accident as that which recently happened on the Versailles railway might have his action against the manufacturer of the defective axle"). See too, Greene K.C. in *Grant* v. *Australian Knitting Mills*. In the latter case Lord Wright suggested that the damage in such cases might be too remote.

[56] Law Reform (Holdsworth Club, Birmingham, 1952). "One claimant was found, after careful investigation by the insurance companies, to have had the misfortune to find a beetle in his soup in twelve different restaurants."

[57] *Farr* v. *Butters Bros.* [1932] 2 K.B. 606, in which Scrutton L.J. seems to have thought that the principle was limited to cases in which intermediate examination was impossible.

[58] [1936] A.C. 85, 106–107.

[59] *Haseldine* v. *Daw & Son, Ltd.* [1941] 2 K.B. 343, at 377, *per* Goddard L.J.

before use.[60] Hence, it is not necessary for the defence to show that the plaintiff used the article with full knowledge of the risk: it is enough if examination and subsequent knowledge could reasonably be expected.[61] This principle, however, does not apply when it might be foreseen that the plaintiff, despite his knowledge, might still reasonably incur the risk.[62] The intermediate examination which, if reasonably to be expected, will exonerate the defendant, may be carried out by some person interposed by him and the plaintiff—for example, the retailer.[63]

Gifts

Before 1932, gifts, as Story remarked,[64] had "furnished very little occasion for the interposition of judicial tribunals, for reasons equally honourable to the parties and to the liberal spirit of polished society." However, it seemed clear that there was no liability on the donor of a defective chattel not in the category of things dangerous *per se*, or known to be dangerous. But it has been said by Denning L.J. that "The decision in *Donoghue* v. *Stevenson* makes the earlier cases on gifts quite out of date."[65] It is not clear whether Denning L.J. ascribes this change in the law to the principle governing the liability of manufacturers of chattels or to the wider neighbour principle.

The Neighbour Principle

It is hard to discuss the significance which judges and authors since 1932 have attached to the neighbour principle without writing the whole history of the tort of negligence. But it can be said with confidence that it is perfectly plain that there are many torts to which it has no application—for example, defamation, inducement of breach of contract, conspiracy. The interests of the individual are here protected in other ways. Nobody has seriously suggested that the whole law of tort should be reduced to a question of what the defendant ought reasonably to have foreseen in the circumstances of the particular case. Reasonable foreseeability is not the necessary and sufficient condition of liability in tort—not necessary, because it has no place in torts of strict

[60] *Mason* v. *Williams & Williams, Ltd.* [1955] 1 W.L.R. 549, 551.
[61] *London Graving Dock Co.* v. *Horton* [1951] A.C. 737, 750, *per* Lord Porter. See, too, the full review of the authorities by Tucker J. in *Herschtal* v. *Stewart & Ardern, Ltd.* [1940] K.B. 155.
[62] *Denny* v. *Supplies & Transport Co.* [1950] 2 K.B. 374.
[63] *Buckner* v. *Ashby & Horner, Ltd.* [1941] 1 K.B. 321, 330–335; *Haseldine* v. *Daw & Son, Ltd.* [1941] 2 K.B. 343, 375–378; *London Graving Dock Co.* v. *Horton* [1951] A.C. 737, 750.
[64] *Commentaries on the Law of Bailments*, s. 285.
[65] *Hawkins* v. *Coulsdon & Purley U. D. C.* [1954] 2 Q.B. 319, at 333; *cf.* Marsh, "Liability of the Gratuitous Transferor" (1950) 66 L.Q.R. 39; Morse, 31 Can.Bar Rev.

liability; not sufficient because even within the field of what is commonly thought of as negligence, there are decisions which cannot either easily (or in some cases at all) be stated solely in such terms. Some of these decisions are pre- and some post-1932. Where the task of reconciliation has failed there has been a tendency to deny the validity either of the decision in question or of the neighbour principle itself. So on the one hand, Denning L.J. has said that the ancient doctrine affirmed by the House of Lords in *Searle* v. *Wallbank* [66] that there is no duty to prevent domestic animals not known to be dangerous from straying onto the highway "seems to be a special exception to the general duty of care which was laid down by the House of Lords in *Donoghue* v. *Stevenson*." [67] Similar language may often be found in discussions of the law governing occupiers' liability and careless statements.[68]

On the other hand, the critics, both judicial and academic,[69] have appealed to those well-established exceptions to show the folly of wide generalisations. A very persuasive answer to many of these criticisms has been given by Scott L.J. in these words: "The critics have fallen in the error of assuming that Lord Atkin was intending to formulate a *complete* criterion, almost like a definition in the prolegomena to a new theory of philosophy. Does not such criticism miss the real value of attempts to get at legal principles?" [70] Bewildered by the many discordant voices, one is tempted to say that the only point of unanimity amongst friend and foe is that nobody has yet suggested that the neighbour principle is too narrow, as distinct from being too wide.[71] Our task, however, must be to attempt to assess the value of the claim that it is a general criterion of liability in negligence. It is the familiar (but nonetheless difficult) search for the middle way. As Fullagar J. has so well said: "On the one hand, we must be careful not to let it degenerate into a disguise for the application of the wholly false principle that the plaintiff (like the pre-war

[66] [1947] A.C. 341.

[67] *Wright* v. *Callwood* [1950] 2 K.B. 515, at 531.

[68] *Cf.* Stephen's *Commentaries*, ii, 399; "The broad and elastic principle of *Donoghue* v. *Stevenson*, with youth on its side, may stretch forth, to invade and confound the uneasy empires of older principles."

[69] Some have already been mentioned. See also *Farr* v. *Butters Bros.* [1932] 2 K.B. 606, 614 (Scrutton L.J.); *Deyong* v. *Shenburn* [1947] K.B. 227, 233 (du Parcq L.J.); *Searle* v. *Wallbank* [1947] A.C. 341, 351 (Lord Maugham). Professor Lawson (22 Tulane L.R. 111, 124) says "It must be admitted that Lord Atkin's famous generalisation missed fire." Dean Prosser (*Torts*, 2nd ed., 168) says (rather surprisingly): "As a formula this is so vague as to have little meaning, and as a guide to decision it has had no value at all." See also his *Selected Topics*, 211.

[70] *Haseldine* v. *Daw & Son, Ltd.* [1941] 2 K.B. 343, at 362. It is a little curious to note the impression which Atkin made on Laski in 1923: "He was very clear and precise but he had that curious legal conservatism which regards principles as eternal instead of approximations now nearer to, now further from, the truth": *Holmes-Laski Letters*, i, 547.

[71] See Lord Reid in *Bolton* v. *Stone* [1951] A.C. 850, at 865.

customer) is always right. . . . We should be careful to see that we do not, purporting to rely upon Lord Atkin, really apply a rule of strict . . . liability to cases in which it would be most unjust to apply such a rule. On the other hand, it would be a great pity to crib and confine a broad principle, laid down by the highest authority, by reference to distinctions which are neither expressed nor necessarily implied in it." [72] It seems that a serious and fundamental confusion may have arisen from a failure to distinguish clearly between two very different functions of this concept (and in particular of Lord Atkin's formulation of it). First, it may be used as a test of whether a new duty should be added to the existing list of admitted duties; secondly, it may be used as a test of the scope or extent of an admitted duty.[73] It is particularly important to make this distinction because it does not follow that because the neighbour principle is adopted in admitting a new duty into the law that the duty itself must be phrased in terms of reasonable foreseeability. The simplest illustration of this point is Lord Atkin's own speech. He created a new duty in the law of negligence and adduced the neighbour principle as his authority for doing so; but the duty itself is, as we have seen, formulated in language chosen with the greatest precision. It would be a very strange reasonable man who could comprehend all its implications and subtleties without instruction from a lawyer. This shows that although it may be true enough at a fairly high level of abstraction and generalisation to talk of a general duty to take care based on reasonable foreseeability [74] the discussion has meaning and significance only in relation to the particular situation, relationship or activity which is under consideration. As has been well said recently, "a duty is a notional pattern of conduct." [75] and such a pattern can take shape only after consideration of the person on whom the duty is imposed, the mode of its performance, and the person to whom it is owed. Here it is possible to learn a lesson from recent cases on the scope of the standard of care required. Ought those who paint a test-cock in a submarine to foresee that if the work is improperly done the submarine will be imperilled? What steps should be taken to safeguard users of the highway by those who own an adjoining elm tree or cricket field or infant's school? What precautions should be taken to safeguard firemen, or window cleaners, or workmen who have only one eye, or are working on a slippery floor? In many of these cases the neighbour principle has been expressly

[72] "Liability for Representations at Common Law" (1951) 25 Austr.L.J. 278.

[73] One of the few cases in which this distinction has been made is *McPhail* v. *Lanarkshire C. C.*, 1951 S.C. 301, 319, *per* Lord Keith.

[74] At this level it is clear that the principle is allied to Pollock's thesis that all harm done to another is actionable unless there is some justification: see Denning, "The Universities and Law Reform" (1949) J.S.P.T.L. 258, 263.

[75] Dias, "The Duty Problem in Negligence" [1955] C.L.J. 198, 202.

referred to as the measure of the scope of the duty owed [76]; but one is forced to conclude, after reading the elaborate (and by no means unanimous) judgments, that many factors besides that of reasonable foreseeability are relevant—the likelihood or probability (as distinct from the possibility) of harm; the gravity of that harm; the burden of the precautions adequate to prevent its occurrence; the comparative social utility of the course of conduct pursued by both parties; and the ability of the defendant to bear the losses resulting from the enterprise or activity which he has promoted. If the standard of care required in cases of comparatively simple facts is a function of so many variables it would be surprising indeed if the duty owed in any case of complexity or difficulty could be factorised out in any simpler way. This recognition that other factors besides that of foreseeability are relevant to the decision of policy which is involved in affording protection against the careless invasion of the particular interest of the plaintiff which is in question has led some to the conclusion that "duty of care" is a formula expressed in terms of results rather than reasons.[77] But although reasonable foreseeability no longer occupies a dominant position as the sole criterion of liability there is no reason to discard it entirely and to state the law in different (and unfamiliar) language. The concept has the advantage that by use of it the question can be decided "by reference to a standard of precision and conduct grounded in normality and practicability rather than in judicial technicality or diversity of view." [78] A good example of a relatively straightforward case in which the neighbour principle was used both to create a new duty and to delimit its scope is *Powlett* v. *University of Alberta*,[79] in which the Board of Governors were held liable to the plaintiff, who had been driven insane by the initiation ceremonies of his fellow students. It may be helpful to review in greater detail some of the cases in which this matter has been discussed.

[76] In a number of judgments of good authority approving reference has been made to the neighbour principle (or the judge has himself formulated a principle in terms not markedly different): see, for example, *Bourhill* v. *Young* [1943] A.C. 92, 104; *Glasgow Corporation* v. *Muir* [1943] A.C. 448, 454, 457; *Davies* v. *Swan Motor Co.* [1949] 2 K.B. 291, 307; *Denny* v. *Supplies & Transport Co.* [1950] 2 K.B. 374, 377; *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164, 188. But in each of these cases (except the last) what was under consideration was not the criterion of liability in negligence but the scope of the duty owed in the circumstances of the particular case—which might well have been delineated adequately in terms of reasonable foreseeability alone.

[77] The deficiencies of reasonable foreseeability are clearly seen in the cases on nervous shock. The issue of policy (namely, ought the law to protect a person's interest in his emotional security from careless invasion?) has never been plainly faced. Instead the decisions contain a mass of confusing statements on what a reasonable motor-cyclist or taxicab driver could foresee.

[78] *Nova Mink, Ltd.* v. *Trans-Canada Airlines* [1951] 2 D.L.R. 241, 255, *per* MacDonald J.

[79] [1934] 2 W.W.R. 209.

Acts and omissions

Here there is general agreement that it is impossible to take Lord Atkin's words literally. It is, of course, clear that once a duty has been recognised as covering a particular relationship then the defendant may break it by an omission as much as by a positive act: the motorist who fails to sound his horn may well thereby be in breach of the duty which he owes to other highway users. (Some would prefer to regard this as a careless act of commission—*i.e.*, driving the car.) But in the absence of a recognised duty a man is still entitled to do nothing, however grievous the consequences to others. This was emphasised (and extended) in *East Suffolk Rivers Catchment Board* v. *Kent* [80] in which the House of Lords decided that one who takes inadequate steps to attain a particular result which he is under no legal obligation to bring about is under no legal liability if those steps do not effect the desired result, provided that they do not increase the damage which would have been suffered had he done nothing at all. It is important to note that Lord Atkin's dissenting speech is not based on an application of the neighbour principle: indeed, as Mr. Landon has rightly emphasised,[81] he went no further in the way of generalisation than to say "Every person . . . is under a common law obligation to some person in some circumstances to conduct himself with reasonable care so as not to injure those persons likely to be affected by his want of care."

Non-physical or pecuniary loss

The extent to which the law does or should protect a person's pecuniary interests from invasion is a matter of controversy. The existence of torts such as conspiracy, deceit, injurious falsehood and conversion sufficiently indicates the wide degree of protection afforded against intentional invasions. There is also some authority to show that pecuniary loss caused by physical acts may be remedied. When pecuniary loss has been caused, not by physical acts but by careless statements, it now appears to be settled by good authority that there is no liability simply on the ground that the maker of the statement ought reasonably to have foreseen loss of that kind when making it.[82] The course of the arguments and the judgments of the majority of the court in *Candler* v. *Crane, Christmas & Co.* are a good illustration of the failure to draw the distinction between the two functions of the concept of reasonable foreseeability which has already been mentioned. The majority (Asquith and Cohen L.JJ.) had little difficulty in showing that the generalisations of Lord Esher and Lord Atkin were not only never intended by their authors to cover such a position but

[80] [1941] A.C. 74.
[81] (1941) 57 L.Q.R. 179.
[82] *Candler* v. *Crane, Christmas & Co.* [1951] 2 K.B. 164. See also *Sinclair* v. *Cleary* (1946) Q.S.R. 74.

were also in any case unsuitable for that purpose. So the accountant who had carelessly prepared accounts on which the plaintiff acted to his detriment escaped liability. But this certainly does not conclude the matter. It is still open to the House of Lords to impose liability in negligence upon the maker of careless statements. When it does so it may well be that greater weight will be given to factors other than that of reasonable foreseeability, which is more appropriate to "the wide arc of chattel negligence." [83] As Mr. R. G. Wilson has well said, "only in blind undiscriminating reliance upon Lord Atkin's dicta . . . can it be claimed that the liability of the manufacturer and the accountant should be identical." [83] This is clearly brought out in the dissenting judgment of Denning L.J. His invocation of the neighbour principle is for the purpose of showing that a new duty can and should be created: he certainly does not use it to measure the scope and extent of the duty itself, which he confined to cases where the accountant prepares his accounts and makes his report for the guidance of the very person in the very transaction in question.[84]

House property

One of the main grounds of dissent by Lords Buckmaster and Tomlin was that if Lord Atkin's judgment were accepted it must logically extend to property of any description, including houses. "If one step, why not fifty? Yet if a house be, as it sometimes is, negligently built, and in consequence of that negligence the ceiling falls and injures the occupier or anyone else, no action against the builder exists according to the English law, although I believe such a right did exist according to the laws of Babylon": so Lord Buckmaster.[85] The well-known rule to which Lord Buckmaster refers also confers immunity on the lessor of defective premises. (The exception for premises which are unfurnished or below a certain rateable value are not here relevant.) It was affirmed by the House of Lords in *Cavalier* v. *Pope* [86] that even if the lessor had expressly contracted to repair he could not be sued by any person lawfully on the premises (other than the tenant) injured by a breach of that obligation. These decisions have been much criticised, and some authorities have said that they can be explained (but not, of course, justified) solely on the ground that they were decided before 1932.[87] Their validity has been challenged

[83] R. G. Wilson, "Chattels and Certificates in the Law of Negligence" (1952) 15 M.L.R. 160, 171.

[84] It is only in this sense that it is possible to accept Professor Friedmann's statement that Denning L.J. "made a valiant though unsuccessful attempt to apply the principle of *Donoghue* v. *Stevenson*": *Law and Social Change*, 78.

[85] [1932] A.C. at 578.

[86] [1906] A.C. 428.

[87] Winfield, *Torts*, s. 163; Paton, *Jurisprudence*, 384–385.

in two cases on the express ground that they had been inferentially overruled by *Donoghue* v. *Stevenson*, but in each case the challenge was unsuccessful.[88] It seems to be assumed that the result would be different if the issue were agreed before a tribunal which felt itself able to disregard or distinguish *Cavalier* v. *Pope*: such a tribunal would be free (as Lord Buckmaster feared) at least to include houses within the scope of the duty owed by the supplier of defective chattels. It may be wondered if the problem could really be solved so simply. So far as vendors are concerned the matter cannot be discussed satisfactorily without reference to contractual rules on the matter. It is perfectly well established that, in the absence of express bargain, the vendor of a completed house is under no liability to the purchaser if the house is defective. There is no implied warranty of fitness as there is in the case of the sale of a chattel under section 14 of the Sale of Goods Act, 1893; it is a clear illustration of the maxim *caveat emptor*.[89] Hence if the person injured is not the purchaser himself but one of his lawful visitors it is very difficult to see why he should be put in any better position *vis-à-vis* the vendor than the purchaser himself would have been had he sustained the injury in question. Indeed, the very fact that the vendor is normally under no contractual duty to the purchaser means that the latter will normally have carried out a survey or inspection. Hence Atkinson J., in his very careful review of the authorities in *Otto* v. *Bolton and Norris*,[90] held that even if the principle in *Donoghue* v. *Stevenson* did apply to the sales of ruinous houses the second plaintiff must fail, for her daughter (the actual purchaser) had carried out a survey which should have revealed the defect.[91] When we consider the position of lessors we are faced with the same difficulties. If the damage has been caused by breach of an express covenant to repair, the injured visitor will normally be able to recover against the tenant and the latter can in turn claim indemnity from the landlord. Hence, in order to avoid circuity of action, there is much to be said for the recommendation of the Law Reform Committee,[92] that the injured party should have the same right of action against the landlord as he would have had if he himself had been the tenant. (But here again it must be remembered that express covenants to repair are a rarity, and that it is a condition precedent to liability that notice of the want of repair

[88] *Otto* v. *Bolton* [1936] 2 K.B. 46; *Travers* v. *Gloucester Corporation* [1947] 1 K.B. 71.

[89] *Perry* v. *Sharon Development Co.* [1937] 4 All E.R. 390. The position is expressly so stated in Condition 12 (3) of the National Conditions of Sale. It is otherwise if the contract is for the purchase of a house in the course of erection: here there is an implied warranty.

[90] [1936] 2 K.B. 46. The plaintiff-purchaser in this case did in fact succeed on her claim because she had the good fortune to have obtained an express warranty of fitness from one of the defendants.

[91] *Johnson* v. *Summers* [1939] 2 D.L.R. 665 adopts a different view.

[92] Cmd. 9305, § 94.

should have been given to the landlord.) If there is no covenant to repair, the same difficulties arise as in the case of the vendor —it is hard to see why the third party should be put in a better position than the tenant himself, and in any case his claim will normally be defeated by the existence of an opportunity for intermediate examination.[93] Finally, there is a grave issue of policy involved: "The present can hardly be regarded as a suitable juncture at which to place fresh burdens on landlords with respect to repairs."[94]

Breach of statutory duty

The well-established rule that no action will lie for damage sustained by a private person through breach of a statutory duty unless the statute on its true construction authorises such an action was challenged in *Commerford* v. *Board of School Commissioners of Halifax*[95] on the ground that the neighbour principle had made it obsolete. The challenge was unsuccessful. "I cannot think," said Ilsley J. "that modern developments in the law of negligence have overthrown the carefully developed jurisprudence on recovery for breaches of statutory duty."

Nuisance

General propositions have on the whole not found favour in this tangled branch of the law. The dismissal of the maxim *sic utere tuo ut alienum non laedas* as "empty verbiage"[96] has been several times cited with approval. But as early as 1933 a strong Divisional Court was prepared to make use of the neighbour principle to impose liability in negligence on a lessor who had retained possession of a roof from which defective guttering fell and injured the plaintiff tenant and his wife who were on the part of the premises demised to them. The court denied that the rules on nuisance were relevant.[97] Another and perhaps more fundamental difficulty was discussed in *Victoria Park Racing and Recreation Ground Co. Ltd.* v. *Taylor*,[98] in which the defendant, on his own land, had broadcast descriptions of races on the plaintiff's land, thereby diminishing the latter's profits. The High Court of Australia, while recognising that "the category of nuisance is not closed,"[99] refused the plaintiff a remedy. In *McGibbon* v. *Robinson*[1] the plaintiff's mink had been frightened by the noise of the defendant's blasting operations

[93] As in *Travers* v. *Gloucester Corporation* [1947] K.B. 71.
[94] Cmd. 9305, § 92. Might there be a case for treating local authorities (as in the *Gloucester Corporation* case) differently from other landlords?
[95] [1950] 2 D.L.R. 207.
[96] By Erle J. in *Bonomi* v. *Backhouse* (1858) El.Bl. & El. 622, 643.
[97] *Cunard* v. *Antifyre, Ltd.* [1933] 1 K.B. 551. In the same year du Parcq J. adopted a similar approach in *Bishop* v. *Consolidated London Properties* [1933] 102 L.J.K.B. 257. But so long as the decision of the C.A. in *Shirvell* v. *Hackwood Estates, Ltd.* [1938] 2 K.B. 677 stands, there must be some doubt about these cases.
[98] (1937) 58 C.L.R. 479.
[99] *Per* Latham C.J. at 493; *per* Rich J. (dissenting) at 503. Evatt J. (dissenting) cited the neighbour principle in support of his view. [1] (1952) 4 D.L.R. 142.

—carried out, as the trial judge said, with "downright cussedness." Plaintiff recovered on the neighbour principle. Our courts would no doubt have given a remedy in similar circumstances.[2]

Occupier's liability

Here we find a clear example of the failure to distinguish between reasonable foreseeability as the test of the existence of a duty and as the test of the scope of an admitted duty. It is generally agreed that the law on this topic is only a special branch of the general law of negligence. But the rather detailed rules which have been evolved to govern the position of the various classes of entrants—invitees, licensees, and trespassers—have been the subject of criticism. It has been suggested (sometimes a note of exasperation is apparent in the discussion of the topic) that they should be rejected and replaced by some principle of greater generality and *Donoghue* v. *Stevenson* has often been cited in support of this. Something like this is in fact recommended in the recent report of the Law Reform Committee.[3] In addition, a number of recent cases, emphasising a line of authority which goes back at least to 1870,[4] suggest that one who is injured as a result of operations conducted on the land need not bring his claim within one of the invitee-licensee-trespasser categories but will have a remedy against the occupier on the simple ground that he has failed to take reasonable care for the safety of the entrant. We seem to be approaching a position in which the invitee-licensee rules will apply only when the harmful activity is related directly to the physical state of the premises.[5] The courts have so far resisted any attempt to whittle away these rules in such a case.[6] Yet it may well be argued that the detailed rules on this topic are but exemplifications of "the broad concept of neighbourly duty."[7] There is a real social and economic difference between those neighbours whose presence on

[2] *Hollywood Silver Fox Farm, Ltd.* v. *Emmett* [1936] 2 K.B. 465. In 1932 Laski wrote to Holmes (*Letters*, ii, 1412) the following account of a conversation with Macnaghten J., who decided this case: "He was so full of distress when I propounded the view that the law of torts was expressive of a certain framework of economic conditions. When I mentioned your 'inarticulate major premise,' he explained to me with something like passion that he had no such premises, that he 'simply applied the law, looking neither to the right nor to the left.' I suggested that his mind might be slightly more complex than he knew, to which he retorted that he was a simple and honourable man and that no damned nonsense about complexity was going to obscure his motives. 'I never give a decision,' he said, 'unless I can find a case to support it.'"

[3] Cmd. 9305.

[4] *Tebbutt* v. *Bristol & Exeter Ry.* (1870) L.R. 6 Q.B. 73, 75–76.

[5] In *Merrington* v. *Ironbridge Metal Works, Ltd.* [1952] 2 All E.R. 1101 it was held that although the plaintiff failed as an invitee he could succeed under the neighbour principle. The case is an isolated one on unusual facts. *Cf. Kennedy* v. *Union Estates, Ltd.* [1940] 1 D.L.R. 662.

[6] So in *McPhail* v. *Lanarkshire C. C.*, 1951 S.C. 301, at 314, Lord Cooper said that to allow the pursuer to disregard the established categories and to found her claim on the neighbour principle "would expand the rule in *Donoghue* v. *Stevenson* beyond the visible and understood limits of the decision."

[7] *London Graving Dock Co.* v. *Horton* [1951] A.C. 737, at 766 *per* Lord MacDermott.

my land I have permitted out of tolerance, indifference or goodwill, and those whom I have invited to come for my own benefit (direct or indirect). It must not be forgotten that the reasonable landowner, desirous only of doing what is proper, is entitled to some clear guidance from his legal advisers if he should consult them. He would hardly think much of an adviser who, in effect, said to him: "You must do what seems reasonable to you: but if, nevertheless, some injury befalls your visitor, you must take the risk that the local county court judge will disagree with what you (and I) think to be reasonable."

There is also a line of cases which show that one who has the right to conduct operations on the premises of another may owe to entrants a duty distinct from that owed by the occupier. In particular, it seems to be established that one who is a trespasser in relation to the occupier is not, by reason merely of that fact, disentitled from suing a non-occupier in negligence. The doctrine may perhaps be traced back to 1913,[8] but the more recent cases are founded directly on the neighbour principle.[9] In one of the most authoritative of them [10] the question is expressly stated to be one of "choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other." It is difficult to be enthusiastic about these decisions. It is hard to see why a non-occupier, who in the normal course of events does not have the same power or ability to exclude trespassers, should be under an obligation from which the occupier is free. Why should the contractor whom I employ to dig a hole in my field be liable when I am not? [11]

Conclusion

This survey seems to result in two conclusions. First, the significance of the neighbour principle has been over-emphasised by both its supporters and its opponents. It was not intended to be, and cannot properly be treated as being, a general formula which will explain all conceivable cases of negligence. Even at a fairly high level of abstraction it needs considerable qualifications and reservations before it can be accepted. It is indeed a sign of the poverty of thought about the law of torts in this country that the proposition should have been called upon to bear a weight so manifestly greater than it could support. While the principle has its greatest value in some comparatively straightforward cases of negligence, either as a factor in the court's decision to admit a new duty of care or as an exposition of the

[8] *Latham* v. *R. Johnson & Nephew, Ltd.* [1913] 1 K.B. 398, see also Lords Warrington and Atkin in the *Excelsior Case* [1930] A.C. 404.

[9] They are surveyed by Ashworth J. in *Creed* v. *McGeogh & Sons, Ltd.* [1955] 1 W.L.R. 1005.

[10] *Thompson* v. *Bankstown Corporation* (1952) 87 C.L.R. 619, 623.

[11] See *Kenny* v. *Electricity Supply Board* [1932] I.R. 73, 92; *Creed* v. *McGeoch & Sons* [1955] 1 W.L.R. 1005, 1008.

scope of a duty so admitted, its true influence has been (and may continue to be) of a more indirect character. Since 1932 a more liberal and inquiring spirit has prevailed in the law of negligence. "Since *Donoghue* v. *Stevenson* all previous decisions on negligence must be reconsidered."[12] It is interesting to note that in 1928 Leon Green could say, with reference to the inquiry into the source of legal duties, "The common law courts have stumbled through the whole period of their existence without committing themselves on this inquiry. Perhaps it is a subject which is not to be talked about."[13] The factors underlying a decision to recognise a new duty are now the subject of open analysis and discussion. There is, of course, much room for further investigation. There is nothing to be lost and much to be gained by a statement of the factors which have influenced the decision in any particular case. In such a way the task of the court in any further case of novelty is made easier. The ultimate mystery of the law will, however, always remain; it will never be possible (even if it were desirable) to forecast with precision how a particular issue will be decided. This is so, not only with the law of torts as a whole (which retains, as Professor Paton has somewhere remarked, some of the feminine characteristics of waywardness and caprice) but with negligence in particular, which is concerned more with the adjustment of losses which have already occurred than with the provision of rules of conduct to guide future behaviour.

Secondly, the attention which has been (very properly) paid to the neighbour principle in all its aspects should not lead us to minimise the other parts of the decision. The abolition of the "privity of contract fallacy" and the imposition of a duty of care on the suppliers of defective chattels were judicial legislation of the highest order. It may well be that the lawyer of the future will regard this as the major significance of *Donoghue* v. *Stevenson*. For the disappearance of the civil jury and the noticeably increased readiness of appellate courts to review inferences from findings of specific fact have greatly complicated the law of negligence. It is permissible to wonder how long a modern industrial society will tolerate the lengthy, expensive, and uncertain process which the common law at present provides for the allocation of responsibility for careless conduct, especially in the case of highway and factory accidents. If an exasperated community should decide to dispense with it all in favour of an extension of the system of social insurance, the lawyer of 1982 may well study negligence only as a chapter of legal history and regard *Donoghue* v. *Stevenson* as one more member of the category of much-cited but little-read repositories of ancient learning.

R. F. V. Heuston.*

[12] Lawson, 22 Tulane L.R. 111, 125n.

[13] *Judge and Jury*, 57.

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THE LEGAL BACKGROUND TO INDUSTRIAL CONFLICT IN AUSTRALIA

Most analyses of Australian industrial law and relations have tended to be examinations either of the so-called compulsory arbitration system from sociological or economic viewpoints or of the framework of the Commonwealth Court of Conciliation and Arbitration and the constitutional limitations under which it functions. Little attention has on the whole been focused on the question to what extent the whole body of statutory and common law does forbid the actual resort to the weapons of economic warfare by employer or employee groups.[1] In the longer treatments of the Australian arbitration system, the aspect of sanctions has been generally treated as a rather unfortunate by-product of the court arbitration concept. Nevertheless from the very nature of the assumptions of a theory of *compulsory* arbitration, such aspect cannot but be of the deepest juridical and social significance. This article will attempt to explore such field. It it stressed that what is involved is a study not only of the obvious explicit sanctions, mainly of a quasi-criminal nature, to be found in the arbitration statutes themselves, but of the relation between them and the more traditional patterns of common law liability in tort. This last interesting question is one that arises very little in England but is posed not only in the Australian situation but also in New Zealand and to some extent in Canada.

First, it is necessary to look briefly at the extent to which the English legislation culminating in the Trades Disputes Act of 1906 finds an echo in Australia.

The attitude of the law towards trade union combination and employee activities in the Australian colonies at about the middle of the last century roughly corresponded to that in England at the same time. The colonies inherited a system under which the Combination Laws no longer had application, though the repressive 6 Geo. 4, c. 129, was in force in at least some of them. However, the legal status of trade unions remained most precarious and the attitude of the law towards strikes and associated activities was capricious and uncertain with a development towards increasing harshness.[2] It is well known that emancipation from the rigours

[1] An article by J. A. Keely in (1951) 5 *Res Judicatae* 38 (Victoria) deals with the right to strike under the Federal law but is for the most part confined to a discussion of the extent to which the Federal Court will use the weapon of deregistration of the union or the tactic of refusing to deal with the union in the case of resort to the strike method.

[2] For the anomalies of the situation see Citrine, *Trade Union Law*, pp. 7–8. The doctrine of criminal conspiracy was developed only gradually and the rules of tort liability did not come till later.

of the common law came in England in three stages. The Trade Union Act, 1871, with some qualifications, removed the trade union from the operation of the doctrine of restraint of trade. The Conspiracy and Protection of Property Act, 1875, in effect made strikes and other forms of economic pressure non-criminal by making combination no longer a criminally significant element when occurring in contemplation or furtherance of a trade dispute. Lastly the Trades Disputes Act, 1906, abolished the *tort* categories of conspiracy and inducement of breach of contract where a trade dispute was concerned and also removed the liability in tort of a trade union altogether. We should also mention the combined effect of the 1875 and 1906 statutes in immunising peaceful picketing from the prohibitions of the criminal law.

Looked at from the standpoint of the degree of reflection of the English legislative trend, the Australian states fall into three classes.

In the first place there is Queensland which is the only one of the states to adopt all three of the English enactments *in toto*.[3]

Secondly, there are the states of Victoria, South Australia, Western Australia and Tasmania which have adopted the Acts of 1871 and 1875 but not that of 1906.[4] The provision of the 1875 statute is limited to trade disputes between employers and employees.

Lastly, there is the state of New South Wales, which, so far as this aspect is concerned, is content to remain in the Stygian pre-1875 darkness and has adopted the Act of 1871 only.[5]

The Commonwealth (*i.e.*, Federal) Parliament has no direct power to legislate in this field.

It is notable therefore that legislative action has been considerably less than in England. It is also remarkable that it has been least in the most highly industrialised state, *viz.*, New South Wales. In fact, whilst all the states with some variations have reproduced the more repressive part of the English Conspiracy and Protection of Property Act of 1875, notably the "watching and besetting" clauses,[6] New South Wales has done so without also introducing the legalisation of peaceful picketing even in the form where the protection is expressed to extend only to attending in order to obtain or communicate information.[7]

Even in those states which copied the provisions of the Act of 1875 respecting criminal conspiracy, it is obvious that the

[3] Criminal Code, 1899, s. 543A; Trade Union Act, 1915, ss. 28, 30.
[4] Employers and Employees Act, 1928, s. 55 (Victoria): Criminal Law Consolidation Act, 1935, s. 260 (South Australia): Criminal Code, 1913, s. 561 (Western Australia): Conspiracy and Protection of Property Act, 1889, s. 2 (Tasmania).
[5] Trade Union Act, 1881–1936, ss. 2, 3.
[6] Conspiracy and Protection of Property Act, 1875, s. 7.
[7] Crimes Act, 1900, s. 545B (added in 1929).

employer, on paper at least, had the power of calling in aid the torts of conspiracy and inducement of breach of contract reinforced by the rather nebulous liability for "intimidation," whilst the state of the law in regard to picketing would seem to invite such a decision as that in *Lyons* v. *Wilkins*.[8] It is true that *Crofter Hand Woven Harris Tweed Co.* v. *Veitch*[9] now removes any real threat of court intervention on the basis of conspiracy where the employees are merely pursuing bona fide community interests and *Thomson & Co.* v. *Deakin*[10] demonstrates that it may be very difficult to prove inducement in the *Lumley* v. *Gye* type of case, whilst even without the Act of 1906 *Lyons* v. *Wilkins* would probably be now regarded as bad law. All this, however, represents a comparatively modern change in judicial attitudes.

Consequently, it comes somewhat as a surprise to find that, even over the period when courts might have been expected to frown most on the activities of employee association, there have been in Australia very few employer attempts to exploit the tort forms of action. There has been a mere handful of civil actions for conspiracy to injure and the majority of these have been claims for damages and not for injunctions.[11] Nor have there been many prosecutions in the field of criminal law. This lack of litigious activity is of course the immediate explanation of the relative dearth of legislation, but consideration of the ultimate social reasons for the former phenomenon must be deferred for the moment.

We now turn to the prohibitions emanating from the compulsory arbitration statutes. Whereas the legislation above briefly considered is in the main emancipatory so far as employees' liberty of action is concerned, the provisions of the arbitration statutes are restrictive.

Since the beginning of the present century Australia, for better or for worse, has committed itself to a system of compulsory court arbitration. Under the Federal Constitution, as the broad residue of legislative powers remains with the states, the state parliaments have a general power to legislate directly to regulate conditions of employment. While New South Wales and Queensland in particular have at times embarked upon a certain amount of this activity, in the main the states have followed the course of setting up tribunals with power to regulate the incidents of the labour relationship by "award" or "determination," and have contented themselves with prescribing certain minimum standards to which such decisions must conform. Whilst Victoria and

[8] [1896] 1 Ch. 811; [1899] 1 Ch. 255. A further point is that in some of the States the old Act, 6 Geo. 4, c. 129, may still be in force, but the speculation may well be regarded as somewhat academic.

[9] [1942] A.C. 435.

[10] [1952] Ch. 646.

[11] The best known is the High Court decision in *McKernan* v. *Fraser* (1931) 46 C.L.R. 343 much of the reasoning in which reads like an anticipation of the *Crofter* case principle.

Tasmania have been faithful to the Wages Board system, under which a Board is constituted for each industry, the other states have adopted what we may call, for the sake of brevity, the "court arbitration" system with a centralised tribunal, usually with at least one Supreme Court judge, having power to deal with all industries.[12]

The Commonwealth (*i.e.*, Federal) Parliament is confined to the heads of legislative power specifically mentioned in the Constitution and has no general industrial power. Whilst there are some enumerated powers which might conceivably give it authority to regulate some phases of industrial relations, it has preferred mainly to rely on the power to make laws with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state." Under this charter it has power merely to set up bodies to conciliate and arbitrate within the indicated area of "interstate industrial disputes." It has acted to set up the Commonwealth Court of Conciliation and Arbitration and a number of Conciliation Commissioners.[13] Awards validly made by these tribunals displace not only state-made awards, but also state statutes, to the extent to which the latter may be inconsistent. In spite of the constitutional limits attaching to the exercise of powers by the Federal tribunals and the watch-dog activities of the High Court as interpreter of the Constitution, such tribunals have proved more popular with the unions than the state courts, and, starting about the year 1920, there has been a steady flight of industries from the state to the Federal system of regulation, less marked of course in some states than in others. A wide interpretation has been given to the phrase "industrial dispute" and with the increasing integration of industry and the nation-wide spread of employee organisation, a little care in serving the union's "log" of demands, which serves as the basis of the "dispute," will create the necessary "interstate" atmosphere. The Commonwealth Court not only regulates a considerable portion of Australian industry but by its activities in relation to the basic wage and the standard hours sets the whole dominant pattern for labour regulation throughout the Commonwealth.

The award of an arbitration tribunal must not be regarded as merely a decision determinative of a particular piece of economic conflict and limited to the disputants before the tribunal. This was never the case with the states that adopted the Wages Board system and is not now the case in the other states. The award becomes something in the nature of an industrial code binding

[12] New South Wales and South Australia, however, operate a Wages Board system at the lower levels.

[13] The name applied to these latter is rather misleading as they perform award-making functions as well as duties of conciliation. The division of functions between them and the court is rather a complicated one.

on all employers and employees operating in the industry, branch of industry or craft, to which it is addressed. The tendency is the same in the Federal sphere. Though it has been repeatedly held that the Commonwealth Court has no power to make its award a "common rule" for the industry,[14] yet much can be done and has been done in the way of securing wideness of application by making as many employer associations as possible parties to the proceedings, and still more can be done by the willingness of bodies on both sides to treat a given case as a test case.

The award, once made, does not become a mere addition to the contract of employment. Its obligations flow from law and breaches of them are matters for prosecution involving the imposition of a penalty. Whether the proceedings on such a breach are truly criminal depends upon whether there is also a liability for imprisonment but this question depends too much upon the *minutiae* of state statutes to be here dealt with. Sometimes the power of entertaining proceedings for breach is exercised by the arbitral tribunals themselves, sometimes by other courts, but in the Federal sphere this is complicated by special considerations.

Industrial awards then are in the nature of partial codes. They are not complete codes inasmuch as each of them requires the existence of some kind of contract of employment on which to operate, and that contract will have a residual application to matters not dealt with by the award. Awards for instance usually leave intact the right of the employer to dismiss summarily for misconduct. Matters familiarly regulated are wages, hours of work and the spreading of hours, payment for special types of work, the question of overtime and, in some cases, the period of notice necessary normally to determine the employment.

It has been thought desirable to stress the legislative character of the award-making power [15] in order to make clear the nature of the body of rules in the light of which the assertion of a right to strike must be judged. It must, however, be realised of course that there is a constantly changing picture. The award may after a time be replaced by another award,[16] it may be varied by the tribunal during its effective life, it may have to be adjusted in scope to prevent undue overlapping with another award, if it is a state award it may be displaced or affected by the flight of the industry into the domain of the Federal tribunal, a matter dictated mainly by economic opportunism. However, through all the shift and change, there usually is, at any given time, save in certain agricultural industries which fall outside the scope of the system,

[14] *Australian Boot Trade Employees Federation* v. *Whybrow* (1910) 11 C.L.R. 311; *The King* v. *Kelly, ex p. State of Victoria* (1950) 81 C.L.R. 64.

[15] The arbitral power is usually described as ancillary to the legislative power—*Waterside Workers* v. *Alexander* (1918) 25 C.L.R. at 464.

[16] Usually a specified time is prescribed for the operation of an award, but after the expiration of such period it continues in operation until replaced by a new award.

some document, loosely referred to as "the award," which for the moment determines pay, hours and other conditions of employment.

The system, however, is one of conciliation as well as of arbitration. In the case of a specific dispute, the tribunal first goes through the process of calling a compulsory conference at which it tries to mediate between the parties, before, as a last resort, it proceeds to compulsory arbitration. In the cases where the primary desire of the parties is to secure some kind of code for the industry, many awards are made by consent; there is also provision for the making of industrial agreements between employer and employee organisations which, subject to certain formal requirements as to filing, have much the same status as awards.

Implicit in the system is the assumption that the award for the time being should be observed by the parties, that if alteration of conditions is desired variation should be sought through agreement, or, failing that, by application to the court to exercise its compulsory powers, or if industrial friction develops over some matter not dealt with by the award, the matter should be "taken to the court."

It is natural, therefore, that such a system should have evolved a series of prohibitions on resort to economic self-help. The *rationale* of this is expressed by Evatt J.[17] (as he then was) in *McKernan* v. *Fraser* [18]—

> "Here [*i.e.*, in Australia] the act of striking has frequently been made punishable. This has not been because Australian legislative bodies have been hostile to the claims of organised labour. The reason is that they have established courts, tribunals and boards for the very purpose of making recourse to the instruments of strike and lock-out unnecessary. Collective bargaining has always had behind it the actual or implied threat of strike or lock-out. But such bargaining has to a very large extent been replaced by compulsory fixation of industrial conditions by a specified tribunal. It is as a logical corollary that recourse to lock-out or strike has been made unlawful."

To a very large degree it is true that a system of compulsory industrial regulation cannot but regard a strike as a kind of excrescence. In spite, however, of frequent rather plaintive dicta from the members of the arbitration tribunals that unions cannot at one and the same time "have direct action and arbitration," Australian unions have consistently refused to agree that the strike and arbitration are inconsistent alternatives. A right to strike is always regarded as a reality. To some extent this attitude derives some support from the system itself. Its implicit assumptions have not been completely translated into law. It cannot be assumed

[17] Now retired from the High Court Bench and the Leader of the Opposition in the Federal Parliament.

[18] *Supra*, at p. 373.

that a strike is necessarily illegal. There is no illegality to be implied from the mere existence of an applicable award, that is to say the mere refusal to accept work or to continue in work, whether such refusal be concerted or not, does not constitute a breach of the award unless the latter specifically provides for such a situation.[19] Still less can inherent illegality be predicated of any other form of economic pressure, such as a boycott or the "go slow" tactic. If illegality exists it does so because of some particular statutory enactment.

Of such enactments there is certainly an abundance. South Australia and Western Australia have statutory provisions under which the doing of any act or thing "in the nature of a strike" is an offence.[20] Tasmania has similar provision but limited to the case where the strike is called in respect of a matter which is covered by a Wages Board determination (*i.e.*, award).[21] The other three states have more modified prohibitions. In Queensland it is an offence to do any act in the nature of a strike unless the strike proposal has first been approved at a secret ballot conducted by the union.[22] Victoria has a like provision but limited to strikes in "essential services."[23] In New South Wales the provisions are peculiar. There is a prohibition of strikes by employees of the Crown and of certain public utility undertakings and of all strikes of which a certain length of notice has not been given. By a further provision, a strike in any industry regulated by the award of a state tribunal is illegal *but* the union can render the award non-operative, provided that it is one that has been in force for at least twelve months, by an affirmative secret ballot.[24] The New South Wales enactment is also peculiar in that the enumeration of illegal strikes is made an exhaustive one. In England the position may well be that a strike for purely political purposes would amount to a common law conspiracy, but in New South Wales it seems that the position is that such a strike would not be illegal if it conformed to the Act, that is, in the normal case, was called after notice and a favourable ballot.[25]

In the Commonwealth sphere, which covers at least one half of Australian industry, there is now no direct legislative prohibition of strikes,[26] though it is still an offence to incite a person not

[19] *Waterside Workers Federation* v. *Commonwealth Steamship Owners Assn.* (1916) 21 C.L.R. 642.
[20] Industrial Code, 1920–1954, s. 100 (South Aust.); Industrial Arbitration Act, 1912–1949 s. 132 (West Aust.).
[21] Wages Board Act, 1920, s. 65.
[22] Industrial Conciliation and Arbitration Acts, 1932 to 1954, s. 51.
[23] Defined as comprising transport, fuel, light, power, water, sewerage and any others prescribed by the Governor in Council—Essential Services Act, 1948, s. 10 (1). Ballot is to be conducted by the State.
[24] Industrial Arbitration Act, 1940–1954, ss. 99, 100, 103.
[25] This would not apply to combined action other than strikes. In fact as the English Act of 1875 was never adopted, it may be that other concert, whether motivated by purely political ends or not, is quite unprotected.
[26] Provisions previously existed but were repealed in 1930.

to work in accordance with an award.[27] It should, however, be mentioned that it has been held several times by the state arbitral tribunals that the state statutes prohibiting strikes, unless there is an express internal limitation, will apply even if the industry affected is covered by a Federal award.[28]

Awards of course sometimes contain clauses prohibiting strike action. It has been held that the repeal of the anti-strike section of the Commonwealth Act in 1930 did not prevent the Arbitration Court from inserting such provisions in its awards.[29] Where there is such a clause, a penalty will lie for a breach. Moreover, under section 29 (b) of the Federal Act, the court may direct compliance with an award proved to have been disobeyed, and this may in some cases render illegal a strike which was not otherwise so. However, the powers under section 29 have been the subject of a recent High Court decision which is noticed later.

It has always been regarded as elementary that there is no obligation on the individual worker to accept work and that he is free to terminate his contract of employment. Consequently, the term "strike" in the state statutes has always been defined in terms of concert and combination. What is made criminal is a conspiracy or combination which manifests itself in a particular overt act, *viz.*, the act of ceasing work in concert. A combination which stops short of manifesting itself in such a way is not touched by the statute, nor, conversely, is the act of ceasing work without prior concert, even if done simultaneously by two or more. The special definitions in the statutes, which do not exclude the ordinary meaning of "strike," are also limited to the act of *cessation* of work, and the decision in *McKernan* v. *Fraser*[30] confirms that a refusal to accept an engagement is usually not a strike. Dicta in the case do suggest, however, that the rule may be different in the case of casual employment, for instance on the waterfront.[31]

State industrial tribunals have given a wide interpretation to the concept of strike. Thus a refusal to perform a certain portion of work which the employer has rightly directed to be done has been held to constitute a strike. So too has a refusal to work overtime when overtime is lawfully required. A strike has been held to exist notwithstanding the giving of the correct period of notice required to terminate the contract of employment.[32]

Some of the state statutes also strike at other self-help activities. South Australia forbids picketing in all circumstances.[33] New

[27] Conciliation and Arbitration Act, 1904–1953, s. 78.

[28] *e.g.*, *Mt. Kembla Collieries* v. *Craig* (1924) 23 A.R.(N.S.W.) 162. It seems that this proposition was accepted in *McKernan* v. *Fraser*, *supra*.

[29] *Seamen's Union* v. *Commonwealth S.S. Owners Association* (1936) 54 C.L.R. 626.

[30] *Supra*. S. 103 of the South Australian Act, however, is a departure.

[31] *Ibid.*, at p. 361.

[32] *Stuart* v. *Cooley* (1912) 11 A.R.(N.S.W.) 89.

[33] Industrial Code, s. 104.

South Wales has a provision which is wide enough to forbid picketing if done to further an illegal strike.[34] Furthermore, in this state, as there is no specific legalisation of peaceful picketing, it seems that picketing in connection even with a lawful strike may amount to a "watching and besetting," though the Supreme Court has held that this is so only if the picketing amounts to a nuisance at common law.[35] In the other states, non-violent picketing would seem to be an offence only if it is an integral part of an illegal strike.

It should be added that, in general, to the extent that the state statutes prohibit strikes, they also prohibit lock-outs.[36] New South Wales, however, prohibits lock-outs *in toto* unless the employees are engaged in an illegal strike.

It is more interesting to turn from an enumeration of these penal prohibitions to consider the question of their effect on the common law causes of action in the ordinary courts. It is submitted that the effect is undoubtedly to revitalise some semi-defunct causes of action but considerations of space compel a somewhat dogmatic presentation.

The most obviously available tort is that of civil conspiracy. It is clear that the doctrine of the *Crofter* case[37] is excluded when the means or object of the combination is illegal in the narrow sense, for instance as being forbidden by statute.[38] The statutory illegalisation of a strike does not of itself create a tort. It does not need to. It will act on an already existing civil cause of action by removing a justification that would otherwise exist. Clearly if an illegal strike is involved, the combination is vitiated whether one regards the strike as means or end. This is clearly implied in the decision in *McKernan* v. *Fraser*[39] and has been held in other Australian decisions.[40] It has the support of the Canadian decision in *Southam* v. *Gouthro*,[41] which also makes it clear that the associated illegal act need not itself be a tort.

Picketing is not of itself a tort unless associated with other elements. However, it usually involves combination. When, therefore, it occurs independently of the existence of any strike and is itself made illegal, as in South Australia, acts of picketing, when done in concert, are actionable as part of a tortious conspiracy and could be enjoined. Where it is not made illegal

[34] Industrial Arbitration Act, s. 105. Note also s. 106 which prohibits the "black" ban, a form of secondary pressure.

[35] *Re Van der Lubbe* (1949) 49 S.R.(N.S.W.) 309. The full *ratio* of *Lyons* v. *Wilkins* has hence not been accepted.

[36] With necessary modifications of course as to the ballot requirement.

[37] *Supra*.

[38] *Ibid.*, at p. 462.

[39] Here there was held to be no strike as there was merely a refusal to accept employment. Had the decision been otherwise on this point however, clearly the decision would have gone to the plaintiff.

[40] *e.g.*, *Brisbane Shipwrights Provident Union* v. *Heggie* (1906) 3 C.L.R. 686; *Roscoe* v. *Wells* (1909) 11 W.A.L.R. 184.

[41] [1948] 3 D.L.R. 178 (Br. Columbia).

per se but is closely associated in fact with an illegal strike, then it is difficult to avoid the conclusion that the same result follows, though here the factor which is decisive in introducing liability is the strike, not the picketing. A view that the picketing can be isolated from the strike, such as was acted upon in two Canadian decisions,[42] seems to be unrealistic unless the picketing was purely informational in type, which it of course rarely is.

The above remarks concerning conspiracy and picketing would, it appears, not be applicable to Queensland which has copied section 1 of the Trades Disputes Act of 1906.[43] The statute bids us approach the matter as if there were no combination, that is to say, no strike. The combination element is removed both from the tort and the crime, leaving nothing. The participant would not be liable[44] unless he failed to give due notice of termination of his contract of employment.

The second tort, *viz.*, that of inducing breach of contract, is not very germane to our topic. If a situation arose where the pressure causing the breach of contract was purely a means for the prosecution of an illegal strike as an end, then the illegality of the strike would undoubtedly remove any defence of "just cause" that might otherwise be available. However, although this defence of "just cause" in this type of tortious action has not been very much investigated, it seems that it would not comprise acts done for the advancement of the interests of employees *simpliciter* as in the *Crofter* case so that its use in an industrial case would not be frequent.[45]

The last industrial tort, intimidation, though at one time it assumed formidable proportions, now seems limited to the case of a threat of an illegal act.[46] There seems no reason why a threat, even though merely by an individual, to bring about an illegal strike, would not be tortious, provided that it did in fact intimidate.

Save in the special case of Queensland, there would seem to be no legal obstacles to holding a registered trade union[47] liable in tort. Australian courts have followed the *Taff Vale* decision[48] and have in fact gone beyond its actual *ratio* to hold that a union has a distinct juristic personality, so that, for instance, it can be held capable of conspiring with its members.[49] This result has

[42] *General Dry Batteries* v. *Briginshaw* [1951] 4 D.L.R. 414 (Ont.); *Peerless Laundry* v. *Laundry &c. Union* [1952] 4 D.L.R. 475 (Man.).
[43] Trade Union Act, 1915 (Q.), s. 28 (1).
[44] The contrary view of Citrine (*Trade Union Law*, p. 490) rests, it seems, on provisions in the 1875 Act in England.
[45] *Thomson* v. *Deakin*, *supra*, at p. 664; Citrine, *op. cit.*, p. 444.
[46] Salmond, *Law of Torts*, 11th. ed., pp. 718–720.
[47] *i.e.*, registered under the Trade Union Acts.
[48] *Taff Vale Ry.* v. *Amalgamated Society of Railway Servants* [1901] A.C. 426. See *Brisbane Shipwrights Provident Union* v. *Heggie*, *supra*.
[49] *Egan* v. *Barrier Branch of Amalgamated Miners Assocn.* (1917) 17 S.R. (N.S.W.) 243.

been reached without any reliance being placed upon the somewhat doubtful effect of the provisions in the arbitration statutes that a union upon registration under such statutes [50] becomes a corporation for the purposes of such statutes.

A brief word on the possibility of other causes of action. Occasionally "no strike" clauses appear in court awards and in industrial agreements executed pursuant to the arbitration statutes. Both awards and industrial agreements are by the relevant statutes made binding both on organisations and on their members and breaches are made punishable by penalty. The question is whether there is any right to sue for damages on breach. So far as the award is concerned, there would seem little doubt as to the position. The obligation is created by the law, there is no flavour of contract and a remedy is prescribed. It is inconceivable that a court would hold that there was any right to sue civilly on the basis of breach of statutory duty.[51] The industrial agreement does present more difficulty. Here there are at least most of the elements of contract. Judicial opinion in Canada seems to be in favour of the existence of contractual remedies in spite of the existence of the penalty.[52] The argument that the position is different by reason of the fact that Canada is a collective bargaining country is not conclusive because the Australian system too has a place for the settlement of disputes by conciliation and agreement. On the other hand, it is true that the Australian statutes do equate the position of an industrial agreement very much to that of an award. On the whole, it is considered that the award and the industrial agreement are regarded as parallel methods of securing the purpose of industrial regulation in a system which does not favour resort to the ordinary civil courts. It is thought, therefore, that in the case of breach of an industrial agreement the statutory method is the exclusive method of redress and that the decision to the contrary in the Western Australian case of *Collie Coal Co.* v. *Watts* [53] is wrong.

The phenomenon we noted previously of the comparative infrequency of tort actions in industrial matters in Australia is explainable by social conditions. In the pre-arbitration era, Australia was very little industrialised and union organisation was significant only in the pastoral and mining industries. When the unions in those industries attempted a trial of strength in the great strikes of 1890–1893, they elected to do so in a period of depression and were decisively defeated simply by the superior economic resources of the employers. Thereafter the impetus of

[50] This is a distinct registration from that under the Trade Union Acts.
[51] The point was decided in the negative in *Wishart* v. *Doyle* [1926] St.R.Qd. 269. See also reasoning in *Josephson* v. *Walker*, 18 C.L.R. 691.
[52] *Hume & Rumble, Ltd.* v. *Local 213, IBEW* (1954) 12 W.W.R.(N.S.) 321.
[53] (1913) 15 W.A.L.R. 97. In this case the terms of the Western Australian enactment would seem to have excluded the common law remedy by express words.

the whole trade union movement was permanently slanted in the direction of political action to bring about the introduction of the compulsory arbitration system. Success eventually followed. By the time that industrialisation began to grow apace, the arbitration system was firmly in the saddle. Employers, though disliking it at first—there were some actions in tort—found that it had many advantages, for instance in the way of stabilisation of wages costs, and as regards the question of enforcement of union obligations, came to think almost exclusively in terms of the arbitration system sanctions, which on paper at least looked much clearer and in fact more severe than those of the common law.

It is plain, however, that the criminal sanctions have failed. Not only have they proved to be difficult of enforcement but their social desirability, especially when they involve imprisonment, is most dubious. They have, moreover, fallen out of favour with popular sentiment. There has been a certain amount of activity under the New South Wales Act but very little of late in the other states. It is a long time, for instance, since any serious attempt was made to enforce the somewhat Draconian provisions of the South Australian Code. In the Federal sphere, the Commonwealth Court has made some use of the "industrial" injunction. This is purely a statutory creation and has little in common with the traditional equity injunction which was used so much in labour disputes in the United States. It stems from a section of the Commonwealth Conciliation and Arbitration Act which gives power to the Arbitration Court to order compliance with an award and to enjoin breach of the Act or of a court order or award. Disobedience to such positive or injunctional orders involves contempt of court and the incurring of a penalty. An increasing use of this method of procedure against unions touched off the recent decision by the High Court of Australia in *The Queen* v. *Kirby, ex p. Boilermakers' Society* [54] that it was unconstitutional to confer on a body exercising arbitral powers, such as the Arbitration Court, any part of the strictly "judicial" power of the Commonwealth such as the power to enforce arbitral awards. This decision has no application to state arbitral tribunals. Even in the Federal sphere it does not involve the destruction of the enforcement provisions; it merely necessitates the rearrangement of the present structure to entrust the enforcement powers to a tribunal which does not exercise the arbitral power. This in fact has been done by an Act reconstituting the system which has just recently passed through the Federal Parliament.

Other techniques have been used by the Commonwealth Arbitration Court. It has adopted the practice of refusing to deal with

[54] [1956] A.L.R. 163. The Judicial Committee of the Privy Council has granted special leave to appeal against this decision.

unions whose members are on strike and in extreme cases has directed the de-registration of the offending union.[55] It is a significant commentary, however, on the effectiveness of the punitive measures at the command of the Arbitration Court that the grave national emergency created by the Coal Strike of 1949 had to be dealt with directly by the Federal Parliament by special temporary legislation.

It is possible that the comparative ineffectiveness of the penal and criminal sanctions of the arbitration law to deal with strikes, when measured against the almost total extinction of the lock-out, and the increasing tendency of many unions to by-pass the arbitration tribunals altogether may lead to a reversion on the part of employers to common law actions for damages. On the question whether this would be an undesirable social development opinions may well differ, but it does seem that if such a situation came about, there would be considerable dangers unless it was made clear that the liability was limited to the case of illegal strikes, unless also the definition of "strike" in the statutory law was made much clearer and, in view of the United States experience, unless in the injunctional sphere committal for contempt was made subject to the right to a jury trial.[56]

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[55] This removes the right of the organisation to act as representative of employee interests in arbitration court procedure. It is a weapon that is always liable to rebound.

[56] References in this article to reports of the proceedings of Australian tribunals are as follows:—

C.L.R.	—	Commonwealth Law Reports (High Court of Australia)
S.R.(N.S.W.)	—	New South Wales State Reports (Supreme Court)
St.R.Qd.	—	Queensland State Reports (Supreme Court)
W.A.L.R.	—	Western Australian Law Reports (Supreme Court)
A.L.R.	—	Argus Law Reports (decisions of the High Court of Australia and of Supreme Court of Victoria).

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POTHIER AND THE THREE DOTS

SINCE Fry J. first quoted Pothier's now celebrated observations on mistake as to the person in *Smith* v. *Wheatcroft* [1] that controversial passage has been set out *in extenso* on no fewer than eleven occasions by judges and text-writers,[2] as well as being referred to in several other places. The quotation, in every case but one,[3] included three dots, indicating that a passage had been left out in the middle. On the most recent appearance of the quotation in this *Review* the writers were seized by an overpowering desire to know the nature of the passage, universally regarded as so lacking in importance as to be represented by three dots. And so they came to open the pages of Pothier for the first time. This is, no doubt, a shameful confession, but they are consoled by the belief that they are not alone in their failure to resort to the *ipsissima verba* of the French jurist.

Their research produced interesting results. The reference given by all the writers who have quoted Pothier is simply "Traité des Obligations, section 19," or "s. 19," or "§ 19." It was therefore somewhat surprising to find that Pothier's treatise is divided into Parts which are sub-divided into Chapters; that the Chapters are divided into Sections which are sub-divided into Articles; and that the Articles are divided into §§. So that all the references are quite meaningless, and there is no section 19 or § 19 in the book. In addition to this method of classification, however, the paragraphs are numbered consecutively throughout the book and it was soon discovered that the correct reference was to *paragraph 19*, which occurs in Part I, Chapter I, Section I, Article III, § 1, or, to use the abbreviations given at the tops of the pages, P.I. c.1. s.1. Art. III. §1.

But this was only the beginning. The next surprise was the discovery that the translation by William David Evans (1806), the only translation which the writers have been able to find in

[1] (1878) 9 Ch.D. 223, 230.

[2] *Gordon* v. *Street* [1899] 2 Q.B. 641, C.A., *per* A. L. Smith L.J.; *Phillips* v. *Brooks* [1919] 2 K.B. 243 *per* Horridge J.; *Lake* v. *Simmons* [1927] A.C. 487, 501 *per* Viscount Haldane; *Sowler* v. *Potter* [1940] 1 K.B. 271, 274 *per* Tucker J.; Cheshire & Fifoot, *Law of Contract* (3rd ed., 1952), 197; Benjamin on *Sale* (8th ed., 1950), 100; Fry, *Specific Performance* (6th ed., 1920), § 230; Salmond & Winfield, *Law of Contracts* (1927) 187; Goodhart, "Mistake as to Identity in the Law of Contract" (1941) 57 L.Q.R. 228, 235; Goodhart and Hamson, "Undisclosed Principals in Contract," 4 C.L.J. 320, 343; J. F. Wilson, "Identity in Contract and the Pothier Fallacy" (1954) 17 M.L.R. 515, 520.

[3] *Phillips* v. *Brooks*, where Horridge J. read only the first half of the usual quotation.

England,[4] differs quite markedly (though the substance is the same) from that employed by all the authorities mentioned above.[5] These all tally exactly with the version in 9 Ch.D. 223, 230, except that some omit the final sentence and, for some reason, Cheshire and Fifoot and Mr. Wilson prefer the phrase "with regard" to "in regard."

The error in citation appears to go back to the *Law Reports* version of *Smith* v. *Wheatcroft* which also refers to § 19. The *Law Times* report (39 L.T. 103, 104), on the other hand, gave the reference correctly as "Traité des Obligations, par. 19." The *Weekly Reporter* (27 W.R. 42, 43) was even more precise saying "Fry J. referred to Pothier on the Law of Obligations, by Evans, Vol. 1, pp. 13, 14."

The translations in these two reports differ slightly from one another (both omit the three dots) and from the *Law Reports* version but much more markedly from the Evans translation. Is it not likely that Fry J. translated the passage from the French himself, and that the reporters took down slightly different versions of what he said? In that case the reference to Evans in the *Weekly Reporter* is curious.

The three dots in question represent about half a page of text which is about twice as long as the actual quotation. The passage consists in the main of the discussion of concrete examples which are of particular interest in view of Mr. Wilson's contention that "Pothier's test does not attempt to define operative mistake [but] is merely an essential prerequisite to proof of mistake,"[6] and that the "test" leaves open the question of what is an operative mistake. Mr. Wilson rejects the conventional view that it is necessary to prove not only that A did not intend to deal with B (with whom he was actually dealing) but that he did intend to deal with an identifiable third party, C, and argues that it is enough to show that A did not intend to deal with B. It is interesting to note, therefore, that Pothier's examples of operative mistake are both cases where A did not intend to deal with B but with C.

> ". . . if with the intention of giving or lending a thing to *Peter*, I give or lend it to *Paul*, whom I mistake for *Peter*, the gift or loan is void for want of my consent; for I did not intend to give or lend the thing to *Paul* but only to *Peter*; a consideration of the person of Peter was an ingredient in the contract that I intended to make.

[4] It is the only translation referred to in the British Museum catalogue.. There is an American translation published in Newburn, N. C., by Martin and Ogden in 1802, but the writers have been unable to locate a copy of it in England. Reference to the copy in the Library of Congress showed that the translation differs both from Evans's and from that in *Smith* v. *Wheatcroft*.

[5] Of the authorities mentioned in note 2 above, only Goodhart and Hamson (4 C.L.J. 320, 343) quoted Pothier's statement "as cited" in *Smith* v. *Wheatcroft*.

[6] (1954) 17 M.L.R. 515, 527.

> "So if intending to have a picture taken by a particular artist, I make a bargain for such picture with another person, whom I mistake for that artist, the bargain is void for want of my consent, for I did not intend to have the picture taken by that other."

This, of course, is only circumstantial evidence and it would be going much too far to attribute to Pothier views on mistake corresponding with those now prevalent in English law.[7] But if, as Mr. Wilson contends, the quoted passage leaves open the question of what is an operative mistake, this is the best evidence we have of Pothier's views on the subject.

Pothier's "Test" and Motive

Mr. Wilson argues that since Pothier requires "the consideration of the person" to enter as "an element into the contract," he "thus expressly excludes motive which is to be found in the mind of the party concerned."[8] This rather tenuous argument is contrary to the view of the passage taken by Cheshire and Fifoot who conclude that "Pothier's test implies that a contract is avoided by a mistaken motive."[9] It is a little surprising that neither Mr. Wilson nor Cheshire and Fifoot refer at all to the following paragraph (20) in which Pothier deals expressly with the problem of motive in contract and says emphatically that an erroneous motive has no effect upon a contract, even when it is communicated to the other party.[10] Arguing from the analogy of legacies, he says:—

> ". . . and for much stronger reasons, it should be decided with respect to agreements, that an error in the motive which induces a party to contract, does not affect the agreement and prevent its being valid; because there is much less reason to presume that the parties intended their agreement to depend upon that motive as a condition; conditions ought to be interpreted *prout sonant*, and conditions which can only be interpolated by the consent of two parties should be implied with more difficulty than in case of legacies."

[7] It is, indeed, perfectly clear that many of the views on mistake expressed by Pothier do not represent the modern English law. For example he holds (para. 17) that an error affecting "that quality of the subject that the parties have principally in contemplation, and which makes the substance of it" makes the agreement void. He instances the sale of a pair of candlesticks supposed by both parties to be silver but in fact plated. It seems clear that in such a case there would be a valid contract in English law: *Leaf* v. *International Galleries* [1950] 2 K.B. 86. Even more important is the fact that nowhere in the section on Error is there any hint of an understanding of the objective standpoint of English law.

[8] p. 521.

[9] *Law of Contract*, (3rd ed.), 197. In the 4th edition, which has appeared since this paper was written, the discussion of Pothier is relegated to a footnote, but its substance remains the same. See p. 193, n. 5.

[10] Disapproving a contrary statement by Pufendorf.

Furthermore the examples which have been quoted above seem to show that Pothier had something more than mere motive in mind when he spoke of error as to the person. He seems to have been thinking of confusion between two persons. Unfortunately he does not give any example of a motive relating to a quality of the other contracting party although, in an earlier paragraph (18), he points out that an error as to some "accidental quality" of a thing sold will not affect the validity of a contract of sale. One who purchases a book, on the supposition that it is a work of excellence when in fact it is below mediocrity, cannot avoid the contract. "My error respecting the goodness of the book only applies to the motive in purchasing it and does not interfere with its being the very book which I intended to buy." It is perhaps not unfair to assume that Pothier would have likewise held that some accidental quality of the person dealt with does not avoid the contract. Cheshire and Fifoot assume [11] that it follows from Pothier's test that where A, a tradesman, agrees to sell scarce goods to B because he mistakenly believes B to be the owner of a local mansion, A's "mistaken motive" annuls the contract. This would indeed follow from the quotation taken out of context but, it is submitted, a consideration of the section on Error as a whole points to an opposite result. Might it not be said, by analogy with the case of the book, that "A's error respecting the residence of B applies only to A's motive in dealing with him and does not interfere with B's being the very person with whom A intends to deal"?

The conclusion seems to be that the passage represented by the three dots and the preceding and succeeding paragraphs support Mr. Wilson in his contention that the "test" merely lays down a condition precedent to proof of mistake and are against Cheshire and Fifoot in their opinion of the implications of the "test" as to motive; but they are against Mr. Wilson, and in favour of the conventional view, as to what is an operative mistake.

POTHIER'S TEST AND NEWBORNE *v.* SENSOLID (GREAT BRITAIN)

Though it is interesting to speculate about what Pothier meant, his views can have very little or no influence on modern English law. Of much more practical importance to the problem raised by Mr. Wilson is the recent case of *Newborne* v. *Sensolid (Great Britain)*.[12]

This case seems to have been overlooked in so far as it bears upon mistake as to the person, though its importance in other respects has been pointed out. The plaintiff was the promoter and prospective director of a limited company, Leopold Newborne

[11] *Law of Contract*, 197.
[12] [1954] 1 Q.B. 45.

(London), Ltd., which at the material time had not been registered. A contract for the supply of goods to the defendants was signed: "Leopold Newborne (London), Ltd." and the plaintiff's name, "Leopold Newborne," was written underneath. The defendants refused to take delivery of the goods and the plaintiff brought an action. He failed before Parker J. and the Court of Appeal on the ground that the contract purported to be between the defendants and a non-existent limited company. The plaintiff did not contract either as principal or as agent. The contract purported to be made by the company and his signature merely authenticated the supposed contract.[13]

Now if there was no contract in this case, why was there a contract in *King's Norton Metal Co., Ltd.* v. *Edridge, Merrett & Co., Ltd.*? [14] In the earlier case the contract purported to be the contract of Hallam and Co. and Wallis did not contract either as principal or as agent. Indeed, it seems at first sight as if the King's Norton Co. had, in one respect, a stronger case than Sensolid for it does not appear that they knew of the name, or even the existence, of Wallis with whom they were held to have contracted. A further difference between the cases is that Wallis was fraudulent whereas Newborne was not; but it can hardly be argued that an innocent man has no contract where, if only he had been fraudulent, he would have had one. The answer to the problem seems to be that Sensolid thought that they were contracting with a limited company, a person quite distinct from its directors and members, whereas the King's Norton Co. thought that they were dealing with a firm with no legal personality apart from that of its members. Sensolid intended to deal not with B but with an identifiable—though yet unborn—third party, C, whereas the King's Norton Co. intended to deal with B, thinking B to be a firm owning a large factory with a number of chimneys and possessing various other desirable attributes, but not confusing him with any other identifiable third party, C, unborn or otherwise.

This solution may be jurisprudentially satisfactory but it leads to the conclusion that the *King's Norton* case would have gone the other way if only Wallis had called his fictitious business "Hallam & Co., *Ltd.*" [15] The two innocent parties who, in that case, were disputing as to who should bear the loss might well be excused for regarding it as an absurdity that the decision should turn upon the accident of whether the rogue decided to describe

[13] See Hamish R. Gray, "The Contractual Capacity of Limited Companies," 17 *Conveyancer* 217.
[14] (1897) 14 T.L.R. 98.
[15] Dr. Glanville Williams considers this result to be in accordance with principle. See (1945) 23 Can.Bar Rev. 380, 401.

his purely fictitious business as a limited company or as a partnership. But this seems to be the result at which English law arrives, and it is by no means clear that Pothier would not have concurred in it.

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STATUTES

Road Traffic Act, 1956

It is to be hoped that the Road Traffic Act, 1956, will mark the culmination of the present complex and unconsolidated mass of statute law relating to the use and misuse of our roads. Little, if anything, is done in the Act to make the presentation and arrangement of that law more comprehensible and less chaotic. There can be no doubt, however, as to the far-reaching importance of the Act both as an amending measure and as an almost limitless source of new law in the shape of statutory instruments to come. A glance through the twelve pages of the Eighth Schedule, which contains no fewer than forty-one so-called minor and consequential amendments, will probably be enough to frighten off all but the most determined and desperate perusers of the Act, and the contents of the Ninth Schedule, containing the enactments repealed, will instantly reveal the remarkable skill of the parliamentary draftsmen in making an already intricate pattern of piecemeal statutory provisions more complicated and patchy than ever.

The Act received the Royal Assent on August 2, 1956, and contains fifty-five sections and nine schedules. The various headings are:—General provisions relating to road traffic (ss. 1 to 18 and First and Second Schedules); Provision of parking places (ss. 19 to 25 and Third Schedule); Provisions as to enforcement (ss. 26 to 32 and Fourth Schedule); Traffic Regulation (ss. 33 to 38 and Fifth Schedule); Public service vehicles (ss. 39 and 40 and Sixth Schedule); Miscellaneous and Supplementary Provisions (ss. 41 to 55 and Seventh, Eighth and Ninth Schedules).

Regarding the operative effect of the statute, it is important to note that, by section 55 (2), the Act shall come into operation on such day as the Minister may by order made by statutory instrument appoint; and different days may be appointed for different provisions. By the Road Traffic Act, 1956 (Commencement No. 1) Order, 1956,[1] most of the provisions of the 1956 Act which do not depend upon the making of Regulations by the Minister were brought into operation by November 1, 1956.

Although some forty-three enactments are referred to in the 1956 statute, much of the bulk of road traffic law is now to be found in the Road Traffic Acts, 1930, 1934 and 1956. These three Acts are indeed ripe for consolidation but until this desirable and necessary end is achieved the main task in reviewing and

[1] S.I. 1956, No. 1491 (C. 10).

commenting upon the 1956 Act is to try to explain as clearly as possible, first, the nature and extent of the more important changes in the existing law and, secondly, the effect of the entirely new and additional provisions.

AMENDING PROVISIONS

The principal amendments to the law relating to road traffic may be summarised as follows, the order being according to sections rather than practical importance.

(1) *Speed Limit* (*s. 4*). Instead of depending on annual renewal by Parliament, the general speed limit of 30 m.p.h. in built-up areas is to be permanent (s. 4 (1)), but the limit may be increased in the case of certain roads to 40 m.p.h. (s. 4 (3) and (4)) on authorisation by statutory instrument, which can only be made, however, after the Minister has reported to each House of Parliament the views of the Departmental Road Safety Committee on the results of the experimental introduction of a 40 m.p.h. speed limit in the London Traffic Area (s. 4 (5)). Two other important amending provisions as to the speed limit in built-up areas are that (i) the mere installation of new lighting on trunk and classified roads will not automatically impose a 30 m.p.h. speed limit (s. 4 (2)); and (ii) roads which are *deemed* to be within a built-up area *must* be appropriately indicated if no relevant system of street lighting is provided (s. 4 (7)).

(2) *Removal of Vehicles* (*s. 6*). Besides being empowered to make Regulations for the removal of vehicles which have broken down or are likely to cause danger or appear to have been abandoned, the Minister is now enabled (s. 6 (1)) to provide for the removal of vehicles on roads if they are causing obstruction.

(3) *Unlawful Sale of Vehicles* (*s. 7*). Although it is made unlawful to sell or supply a motor-vehicle or trailer in such a condition that its use on a road would contravene any Regulation as respects brakes, steering gear or tyres, or if its obligatory lighting equipment or reflectors are defective (s. 7 (1)), the validity of any contract or any rights arising thereunder are not to be affected (s. 7 (3)).[2] In accordance with the decision in *Badham* v. *Lambs, Ltd.*,[3] a civil action for damages will not lie for a mere breach of the above statutory duty because the principal object of the provision is to punish offenders and not to protect purchasers.

[2] See *Vinall* v. *Howard* [1954] 1 Q.B. 375, C.A.
[3] [1946] K.B. 45.

(4) *Influence of Drink Offences* (*s. 9*). The offence of being *in charge* of a motor-vehicle on a road or other public place when under the influence of drink or a drug to such an extent as to be unfit to drive is separately dealt with rather than being part of section 15 (1) of the Road Traffic Act, 1930. The most important amendment is that a person shall be deemed *not* to have been "in charge" of a motor-vehicle if he proves (i) that at the material time the circumstances were such that there was no likelihood of his driving the vehicle so long as he remained unfit to drive; *and* (ii) that between his becoming unfit to drive and the material time he had not driven the vehicle on a road or other public place (s. 9 (1) proviso). The expression "unfit to drive" is defined to mean "under the influence of drink or a drug to such an extent as to be incapable of having proper control of a motor-vehicle" (s. 9 (1)).

The effect of the above proviso in section 9 (1) of the Road Traffic Act, 1956, is to amend, and overrule, the judicial interpretation of "in charge" in a number of recent cases.[4] The following four Scottish cases, however, remain unaffected and are still useful. In *Clark* v. *Clark*,[5] the supervisor of a learner-driver was held to be "in charge" of the vehicle; but where a motor mechanic was engaged to repair a motor vehicle by the roadside, it was held in *Adair* v. *McKenna*[6] that he was not "in charge," since he had no authority to drive the vehicle. In *Crichton* v. *Burrell*,[7] the High Court of Justiciary decided that a person was *not* "in charge" of his vehicle when he was merely waiting beside it with a friend and an employee had been sent for to drive the defendant home. Similarly, where friends had put the defendant into the back of his car in a car park and immobilised the vehicle by removing the rotor arm of the distributor, it was held in *Dean* v. *Wishart*[8] that the defendant was *not* "in charge."

(5) *Driving Test* (*s. 16*). If a person has not held a driving licence during the period of *ten years* ending on the date of coming into force of the licence applied for, he must normally pass the prescribed driving test (s. 16 (2) and (3)).

(6) *Provisional Driving Licences* (*s. 18*). Where a person holds a provisional driving licence or has held one within twelve months preceding the coming into force of the licence applied for *and* has held a previous provisional licence within twelve months preceding the date of commencement of his last provisional licence, the licensing

[4] *Haines* v. *Roberts* [1953] 1 All E.R. 744; [1953] 1 W.L.R. 309; *Leach* v. *Evans* [1952] 2 All E.R. 264; *Duck* v. *Peacock* [1949] 1 All E.R. 318; *Jowett-Shooter* v. *Franklin* [1949] 2 All E.R. 730.

[5] 1950 S.L.T. (Sh.Ct.) 68.

[6] 1951 S.L.T. (Sh.Ct.) 40.

[7] 1951 S.L.T. 365.

[8] 1952 S.L.T. 86.

authority *may* refuse to grant the licence applied for *unless* he has applied for a driving test to be taken within six months and *either* took such a test during the currency of his last provisional licence *or* shows reasonable cause for not having done so (s. 18 (1)). The maximum fee for a provisional driving licence is increased from five to *ten shillings*, the duration of the licence being similarly doubled from three to *six months* (s. 18 (2)).

(7) *Penalties* (*ss. 26 and 46*). Existing penalties are *increased* for offences under sections 11 (reckless or dangerous driving), 12 (careless driving) and 15 (driving under the influence of drink or a drug) of the Road Traffic Act, 1930, and for contraventions of the Pedestrian Crossings Regulations, 1954.[9]

(8) *Disqualifications* (*ss. 26 to 29*). The following changes and amendments are important:—(i) On a second or subsequent conviction for an offence of reckless or dangerous driving under section 11 of the Road Traffic Act, 1930, a driving disqualification of *not less than* nine months *must* be imposed unless more than three years have elapsed since the offender's last conviction under that section (s. 26 (1) (*b*)). (ii) On a second or subsequent conviction for an offence of careless driving under section 12 of the Road Traffic Act, there is now *no* limit of three months to the length of disqualification which may be imposed (s. 26 (1) (*c*)). (iii) The offences in respect of which disqualification or endorsement may be ordered are now governed by, and set out in, the Fourth Schedule to the 1956 Act (s. 26 (2)). (iv) A person convicted of driving, or attempting to drive, a motor-vehicle while under the influence of drink or a drug *may* be ordered to be disqualified from driving until he has passed a driving test (s. 26 (4)). (v) Application for the removal of a driving disqualification *cannot* be made within (a) six months, if the disqualification is for less than a year; (b) one half of the period of the disqualification, if it is for less than six years but not less than a year, and (c) three years, in any other case (s. 27 (1)). Any time after a conviction during which a disqualification was suspended pending an appeal is, of course, to be disregarded (s. 27 (2)). (vi) Any person who is disqualified from driving by virtue of a conviction may appeal against the disqualification in the same manner as against a conviction, and the court by or before whom he was convicted may, if it thinks fit, pending the appeal suspend the disqualification (s. 28). (vii) The power of a court under the proviso to section 6 (1) of the Road

[9] S.I. 1954, No. 870.

Traffic Act, 1930, to limit a driving disqualification to the same class or description of vehicle as that in relation to which an offence was committed, is repealed (s. 29 (3)). Cases such as *Burrows* v. *Hall* [10] (limitation of disqualification to the driving of private motor-cars only), *Petherick* v. *Buckland* [11] (disqualification limited to five-hundredweight vehicles) and *West* v. *Jones* [12] (disqualification improperly limited to the driving of motor cars *for private purposes* altered by the Divisional Court so as to extend to motor-cars generally) are accordingly no longer applicable.

(9) *Special Reasons* (*s. 29 (2)*). Where a person is convicted of using, or causing or permitting the use of, an uninsured motor-vehicle contrary to section 35 (1) of the Road Traffic Act, 1930, there must *not* be any automatic disqualification for holding or obtaining a driving licence for a period of twelve months, because the former requirement that a person convicted of a section 35 offence was to be disqualified unless the court for "special reasons" thought fit to order otherwise, has now been repealed (s. 29 (2)). The following cases on the meaning and effect of "special reasons" for the purpose of offences under section 35 are accordingly no longer of importance: *Knowler* v. *Rennison* [13]; *Williamson* v. *Wilson* [14]; *Labrum* v. *Wilkinson* [15]; *Blows* v. *Chapman* [16]; *Quelch* v. *Collett* [17]; *Lyons* v. *May* [18]; *Gardner* v. *James* [19]; *Reay* v. *Young* [20]; *Taylor* v. *Saycell* [21]; and *Pilbury* v. *Brazier*.[22]

(10) *Warning of Intended Prosecution* (*s. 30*). The provisions of section 21 of the Road Traffic Act, 1930, requiring a warning of the possibility of a prosecution at the time of an offence or, alternatively, a notice of intended prosecution, or summons, within 14 days thereafter in the case of prosecutions for reckless or dangerous driving, careless driving, or exceeding a speed limit, are *extended* to offences under sections 49 (failure to obey traffic directions or to conform to traffic signs) and 50 (leaving vehicles on roads in dangerous positions) of the Road Traffic Act, 1930.

(11) *Traffic Signs* (*s. 35*). Since the expression "traffic sign" is defined so as to mean, *inter alia*, any line or mark on a road for conveying prescribed or authorised warnings, information, requirements, restrictions or prohibitions (s. 35 (1)), the decision of the Divisional Court in *Evans*

[10] [1950] 2 K.B. 476.
[11] [1955] 1 W.L.R. 48; [1955] 1 All E.R. 151.
[12] (1956) 120 J.P. 313.
[13] [1947] K.B. 488.
[14] [1947] 1 All E.R. 306; 63 T.L.R. 152.
[15] [1947] K.B. 816.
[16] [1947] 2 All E.R. 576.
[17] [1948] 1 K.B. 478.
[18] [1948] 2 All E.R. 1062.
[19] [1948] 2 All E.R. 1069.
[20] [1949] 1 All E.R. 1102.
[21] [1950] 2 All E.R. 887.
[22] [1951] 1 K.B. 340.

v. *Cross* [23] that a white line painted on a road was not a "traffic sign" is overruled.

(12) *Lighting-up time* (*s. 41*). Throughout the *whole* year, the "hours of darkness" are between half an hour (*not* one hour during summer time) after sunset and half an hour (*not* one hour during summer time) before sunrise.

(13) *Driving Licences* (*s. 48*). The period of validity of driving licences is increased from one to *three years*, the fee being similarly increased from five to *fifteen shillings*.

NEW PROVISIONS

The entirely new provisions of the Road Traffic Act, 1956, may be dealt with briefly, because they are mainly in the nature of delegated legislative powers enabling the Minister of Transport and Civil Aviation to make a whole mass of new statutory instruments after appropriate consultations, research and experiments. These new powers are principally concerned with a number of serious problems which have arisen from the enormous growth in road traffic during the past few decades. For example, the Minister may by regulations make provision for the *compulsory examination* of motor-vehicles for the purpose of ascertaining whether the prescribed statutory requirements relating to the construction and condition of motor vehicles or their accessories or equipment are complied with (s. 1 (1) and (2)). Regulations may also provide for the issue of *test certificates* certifying that at the date of the examination the requirements were satisfied (s. 1 (2)). The use on a road of a motor-vehicle registered for more than *ten years* is prohibited unless a test certificate as to the satisfactory condition of the vehicle and its equipment has been issued within the last twelve months or such shorter period as may be prescribed by regulation of the Minister (s. 2 (1), (7) and (8)). Another noteworthy legislative power delegated to the Minister is to make regulations prescribing by reference to shape, construction or any other quality the recommended types of protective helmets for motor-cyclists (s. 42 and Seventh Schedule).

Other important new provisions relate to:—(i) increase of road safety information, propaganda and training schemes (s. 5 and Second Schedule); (ii) application to pedal cyclists of sections of the Road Traffic Acts, 1930 and 1934, dealing with reckless, dangerous and careless driving, driving under the influence of drink or a drug, and the power of constables to require drivers to stop and give their names and addresses (s. 11); (iii) fining of pedestrians who disregard the signal of a policeman who is in uniform and controlling traffic (s. 14); (iv) keeping of dogs on leads on any

[23] [1938] 1 K.B. 694.

road designated by an order of the local authority and confirmed by the Minister (s. 15); (v) the provision, regulation and control of parking places where charges may be made (ss. 19 to 25 and Third Schedule) and (vi) provision of a defence to a person using a motor-vehicle without the third-party insurance required by section 35 of the Road Traffic Act, 1930, if he proves (a) that the vehicle did not belong to him and was not in his possession under a contract of hiring or of loan, (b) that he was using the vehicle in the course of his employment, and (c) that he neither knew nor had reason to believe that there was no third-party insurance in force in relation to the vehicle (s. 29 (1)).[24]

Finally, a new road traffic offence of special importance is created by section 8 (1) of the Road Traffic Act, 1956, which provides that any person who " causes the death of another person by the driving of a motor-vehicle on a road recklessly, or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the road, and the amount of traffic which is actually at the time, or which might reasonably be expected to be, on the road, shall be liable on conviction on indictment to imprisonment for a term not exceeding *five years*." It should be observed that an offence of causing death by reckless or dangerous driving *cannot* be tried at Quarter Sessions (s. 8 (2)) but only at Assizes; and if the jury are *not* satisfied that the driving was the cause of the death but are satisfied that the driving was reckless or dangerous, they can convict for an offence under section 11 of the Road Traffic Act, 1930 (which penalises reckless or dangerous driving), whether or not the requirements of section 21 of that Act, relating to notice of prosecutions, have been complied with (s. 8 (4)). In determining whether or not the driving in any particular case was " reckless " or " dangerous," a number of previous decisions of the courts regarding reckless and dangerous driving for the purposes of section 11 of the 1930 Act will be relevant. For example, in *Andrews* v. *D. P. P.*,[25] the House of Lords held that a person may be guilty of " reckless " or " dangerous " driving without being so negligent that a conviction of manslaughter would have been justified if death was caused. In *Kingman* v. *Seager*,[26] the Divisional Court held that the offence of " dangerous driving " was complete where *potential*, rather than actual, danger to the public was proved, and in *Bracegirdle* v. *Oxley* [27] and *Bracegirdle* v. *Cobley*,[27] it was held

[24] This new type of defence would cover the circumstances in a case such as *Blows* v. *Chapman* [1947] 2 All E.R. 576, where a farm labourer drove his employer's tractor over part of a highway on the orders of his master and without any reason for supposing or suspecting that the insurance policy held by his employer did not cover what he had been ordered to do.

[25] [1937] A.C. 576.

[26] [1938] 1 K.B. 397.

[27] [1947] K.B. 349.

that excessive speed may, but need not necessarily, constitute "dangerous driving." Since the nature of reckless or dangerous driving is governed by objective and universal standards, learner or inexperienced drivers cannot claim any special dispensation; and because it does not matter *why* a person is in fact driving dangerously, it was held in *Kay* v. *Butterworth*[28] that a driver who has fallen asleep may nevertheless be guilty of dangerous driving even though he is not conscious of his actions when an accident occurs.

Conclusion

The Road Traffic Act, 1956, is certainly a major landmark in the modern law relating to the regulation and use of the many millions of motor-vehicles taken onto our roads by an ever increasing number of drivers. One may well ask whether the new offences and the more severe penalties will in any appreciable way help to reduce the appalling number of road accidents which bedevil the present generation of road users. Certainly, few serious road accidents can now occur without a breach of law on the part of someone, but the responsibilities of Parliament are surely much more positive and constructive than the mere negative creation of thousands of possible road traffic offences and the enabling of greater penalties to be imposed upon defaulting drivers and riders. For example, it may well be that no substantial reduction in the number of road accidents will ever be achieved until definite obligations and duties are imposed upon public authorities to provide wider and safer roads; more pavements, footpaths and cycle tracks; better parking facilities; and less dangerous corners, crossings and road junctions. In this connection, it is indeed remarkable that Parliament has failed to abolish the old common law *nonfeasance* immunities granted to highway and lighting authorities many centuries ago.

M. R. R. Davies.

[28] (1945) 173 L.T. 191; 101 J.P. 75.

REPORTS OF COMMITTEES

Special Report from the Select Committee on the House of Commons Disqualification Bill (H.C. 349 of 1955–1956)

The main object of this Bill is to give effect to Part I of the Report from the Select Committee on Offices and Places of Profit under the Crown (H.C. 120 of 1940–1941). That Report contained the form of the Bill contemplated by that Committee and its first provision was to be: "Except as hereinafter provided all persons holding an office from or under the Crown shall be disqualified for election to or for sitting as a member of the House of Commons." The present Bill, as committed, stated in clause 1: "Subject to the provisions of this Act, a person is disqualified from membership of the House of Commons who for the time being . . ." and there followed a list of offices being judicial, in the civil service, in the armed forces, in the police forces, the membership of foreign legislatures, and others miscellaneous but specified. Then the Bill, in clause 1 (1) (*g*), disqualified any person who held "any paid office or place under the Crown not described in the foregoing paragraphs of this subsection." The Bill, as amended by the Select Committee, omitted clause 1 (1) (*g*). And the amendment is clearly fundamental. For all disqualifications thereby become specific and there is no general provision. This should reduce the number of subsequent discoveries that a Member is disqualified and the need for Acts of indemnity. In the last few years the situation has become mildly farcical and the parties have exchanged "tu quoque" allegations across the floor rather as children will. The meaning of "office of profit" has taken flight and is at present to be sought in the outer air of lawyers' disputation so that the Attorney-General advised a Select Committee on Elections in *Beattie's* case (H.C. 145—I of 1955–1956, Q. 3): "Remuneration is always profit. Allowances may or may not be. Compensation for loss of earnings is not profit. Compensation for loss of remunerative time may or may not be profit." Such distinctions indicate ingenuity but in this matter clarity is of more value.

The Committee considered at length "whether it would be preferable to substitute the principle of disqualifying a member of the House of Commons from holding any of the specified offices for the principle that the specified offices should disqualify the holder from membership of the House of Commons." Eventually this principle of "reverse disqualification" was rejected by the Committee mainly because, in their view, the existing principle leaves the House in more complete control of its composition and procedure, and the introduction of "reverse disqualification"

might lead to conflict between the House of Commons and the courts.

The Bill, as committed, contained a clause on Crown contracts. This provided, with exceptions: "A person is disqualified for membership of the House of Commons if he, or any body corporate over which he has control, is party to a contract to which this section applies and any obligation imposed on him (or, as the case may be, on that body corporate) by the contract remains unperformed and enforceable." The section applied generally to "any contract made with a department or officer of Her Majesty's Government in the United Kingdom being a contract for the furnishing of money to be remitted abroad, or of wares or merchandise required for the purposes of Her Majesty's said Government or of the Government of Northern Ireland." This clause has been struck out by the Committee. The Committee observed that under this clause (which largely re-enacts the existing law) "it would be possible for a member with large contracting interests to erect a huge block of Government offices without thereby incurring disqualification, while another member, perhaps supplying for the same office furniture worth little more than a hundred pounds, would disqualify himself." The Committee found the task of removing such anomalies too much. They were comforted by the evidence of the Clerk of the House that "he had neither evidence nor knowledge of any corruption affecting members in connection with Government contracts for the past hundred years." This inference from the evidence of the Clerk of the House is worth examining. The Committee refer to Qs. 505–510. The witness was first asked: "Has it been suggested in any of the cases which you have been good enough to cite to us over the last fifty-five years that there has been any element of corruption?" Answer: "No, I do not think there has." The witness then referred to "one or two rather odd goings on" in 1845 and 1868. He was then asked: "But as far as this century is concerned, would it be correct to say that in all the cases of disqualification that have arisen there has been no suggestion of corruption and the matter that has been inquired into has been purely technical?" Answer: "I think that is true." Next he was asked: "You have mentioned some odd cases in relation to Members trying to avoid the consequences of the Act, but do I take it that there has been no suggestion of any corruption?" Answer: "No. They were attempts to evade the law." Finally: "So that even going back 100 years there has been no suggestion of corruption resulting from any contractual relationship?" Answer: "I think that is so." In a supplementary memorandum the Clerk of the House made it clear, says the Committee, "that the House might properly treat as a contempt the offer of a Government contract by a member of the Executive to a member of Parliament in order to influence his Parliamentary conduct."

Despite all this, doubts must remain about the wisdom of the Committee's deletion of the clause. There is first the obvious point that the law may have had an unknown deterrent effect. Secondly, the proposed clause makes one important amendment to the existing law by including a reference to bodies corporate over which a person has control. This is new and, although it clearly presents difficulties of interpretation, its novelty means that the value of precedents is weakened. Finally, the Clerk of the House said (Q. 474): "My view would be that it would be better to err on the side of strictness . . . than to run the risk. I think that the moral effect of the strictness in this House is tremendous. One sees it when one goes abroad and talks to Parliamentarians from other places. That is very well worth preserving and I would deprecate anything which might even give the appearance of loosening up on that." The Committee were at pains in their Report to stress that the suggested repeal of the existing law did not indicate "the least inclination by the House to tolerate any form of corruption connected with Government contracts" and were satisfied that the House had other ample powers to deal with such cases. It will be interesting to see what the House does with this recommendation. It is sometimes necessary to fall over backwards in order to stay upright.

A new clause in the Bill (somewhat amended by the Committee) provides that any person who claims that a person purporting to be a member of the House of Commons is disqualified by this Act or has been so disqualified at any time since his election, may apply to Her Majesty in Council for a declaration. This will be heard by the Judicial Committee of the Privy Council. The Judicial Committee may remit the case to the High Court, the Court of Session or the High Court of Northern Ireland (depending on where the constituency is) to determine (finally) any issue of fact. Declarations are not to be made under this section if an election petition is pending or has been tried on the same grounds or if the House of Commons has directed that a disqualification shall be disregarded under clause 6 (2) of the Bill.

One last point of constitutional interest. Under clause 5 (as amended) a resolution of the House of Commons to add a disqualifying office to the First Schedule may lead to an Order in Council to that effect. "The result is," says the Committee, "that substantive changes in the constitutional law of the country will be able to be effected without the need for a new statute. In the absence of any satisfactory alternative, and having regard to the advantages to be gained by the changes generally, Your Committee have agreed to this clause, but they think it right to call the attention of the House to this." Delegated legislation comes of age.

J. A. G. Griffith.

NOTES OF CASES

Defect of Reason from Disease of the Mind

The McNaghten Rules may well have been given a new meaning by the decision of Devlin J. in *R.* v. *Kemp*,[1] a case heard at the Bristol Summer Assizes. The celebrated formulation by the judges in 1843 was couched in the following terms:—

> ". . . to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong . . ."[2]

It had come to be accepted that the phrase "defect of reason, from disease of the mind" applied to persons suffering from one of the recognised forms of psychosis or major diseases of the mind, and that minor forms of mental disorder (neurosis) were not included. It seems that the decision under review renders possible the inclusion under the McNaghten Rules of persons who can scarcely be regarded as suffering from mental disease or disorder at all but who are nevertheless not responsible for their conduct.

In this case we are told that the accused was suffering from "a physical disease, namely arteriosclerosis or hardening of the arteries, which had not then reached a stage at which he displayed any general sign of mental trouble. Apart from depression, not an irrational depression, produced by his poor state of health, there were no signs at all of mental trouble."[3] An elderly man of excellent character, he suddenly made an entirely motiveless and irrational attack upon his wife during the night, striking her with a hammer and causing a grievous wound. This was apparently caused by a congestion of blood in the brain as a result of a sudden rise in blood pressure, and the accused suffered a temporary lapse of consciousness. Defence counsel argued that the accused, not being conscious of the act which he committed at the time, could not be held responsible for it. As the condition was not due to disease of the mind, he was entitled to be acquitted. It is understood[4] that the first medical witness was called by the

[1] [1956] 3 W.L.R. 724; [1956] 3 All E.R. 249.
[2] (1843) 10 Cl. & Fin. 200, at p. 207.
[3] *Loc. cit.*, p. 725.
[4] The writer obtained some additional information about the course of the trial which does not appear in the report but which helps to clarify the proceedings.

prosecution to prove the injuries inflicted upon the accused's wife. He had known the accused for a considerable time, and under cross-examination expressed the opinion that as a result of his condition the accused was not conscious of his acts at the material time. The defence then called a consultant physician, who agreed with the view expressed by the prosecution's previous medical witness but who in addition expressed the opinion that the condition from which the accused was suffering at the time was not a disease of the mind and would not medically be treated as such. The prosecution then tendered medical evidence to rebut the evidence for the defence by proving that the accused was in fact at the material time suffering from a mental disease, namely melancholia. The defence objected to this evidence, but their objection was overruled, and Devlin J. gave a judgment on the legal submissions.

The judgment is to the effect that whichever view the jury took of the medical evidence—whether they held that the act was done under a temporary clouding of the mind or under mental disease—they must bring in a special verdict, which is what they did. The learned judge held that the words "disease of the mind" which qualify "defect of reason" in the McNaghten Rules were not put in for any other purpose than to exclude defects of reason "caused simply by brutish stupidity without rational power."[5] Hardening of the arteries is a disease which is capable of affecting the mind in such a way as to cause a defect, temporarily or permanently, of its reasoning and is therefore a disease of the mind within the meaning of the Rules. It is not a question whether there is disease of the brain, nor is it a question whether there is physical or mental disease, for the law is not concerned with the brain but with the mind and the faculties of reason, memory and understanding.

It is submitted that the following points emerge from this case:—

1. That defect of reason from disease of the mind is not restricted to that form of mental disease known as psychosis.

It is interesting to note that the Report of the Royal Commission on Capital Punishment, while accepting that mental disease broadly corresponds with psychosis, recognises that it "may also arise in cases such as epilepsy and cerebral tumour, which are not ordinarily regarded by doctors as psychotic."[6] Moreover, the case of *D. P. P.* v. *Beard*[7] establishes that persistent drunkenness can result in a condition of temporary insanity. In this respect there is some authority for the learned judge's view.

2. That a person who commits a violent attack on another when he is not conscious of the act is not necessarily entitled to acquittal on a criminal charge.

[5] p. 731.
[6] Cmd. 8932, September 1953, § 212, p. 73.
[7] [1920] A.C. 479.

The decision of Barry J. in *R.* v. *Charlson* [8] to the contrary effect is considered by Devlin J. and distinguished. This makes good sense from the point of view of public protection, but seems contrary to some of the statements in the texts.[9]

3. That by raising the defence of unconscious conduct the accused may be taken to raise the issue of insanity.

This will make it difficult for defence counsel to adopt this line of defence in future, for if they do, they must take the risk of a special verdict. Against such a verdict there is no appeal.[10]

Finally, the case strengthens the argument in favour of an amendment to the law to allow an appeal in cases of special verdicts, for on these facts it might well have been held on an appeal that the defence did not intend to raise the insanity issue, and it was therefore not open to the court to direct that a special verdict should apply, and the accused should have been acquitted. In any case, a decision of such general importance should be appealable.

J. E. HALL WILLIAMS.

WHITHER QUASI-CONTRACT?

IT is premature to do more than draw attention to *Receiver for the Metropolitan Police Dist.* v. *Croydon Corporation* [1] and *Monmouthshire C. C.* v. *Smith* [2] for the issue is obviously destined for the House of Lords. But the questions involved are of such outstanding practical importance and theoretical interest that brief reference must be made to them at the present stage.

It must now be taken as established that the normal employer cannot recover for loss of an employee's services from someone who has tortiously injured the employee. That the action *per quod servitium amisit* would not lie in respect of the loss of services of a police constable was decided by the Privy Council in *Att.-Gen. for N. S. W.* v. *Perpetual Trustee Co.*,[3] and in a very recent decision (*I. R. C.* v. *Hambrook* [4]) relating to another type of

[8] [1955] 1 W.L.R. 317.

[9] But Glanville Williams, with his customary prescience, points out that "sleepwalking may in fact indicate a neurotic state, and a person who kills while sleepwalking may be as dangerous in future as one who kills in a state of clouded consciousness which occurs during the day. . . . The present medical opinion is that sleepwalking is often associated with nocturnal epilepsy; such a patient may be dangerous, and an insanity verdict would obviously be proper." *Criminal Law: The General Part*, § 95, p. 317. Yet at § 5, p. 12, he states that sleepwalking is not a case of insanity, being at most a neurosis, and the McNaghten Rules are inapplicable.

[10] *Felstead* v. *R.* [1914] A.C. 534. See Glanville Williams, *op. cit.*, § 90, pp. 299 *et seq.*, for a full discussion.

[1] [1956] 1 W.L.R. 1113; [1956] 2 All E.R. 785.

[2] [1956] 1 W.L.R. 1132; [1956] 2 All E.R. 800.

[3] [1955] A.C. 457.

[4] [1956] 3 W.L.R. 643; [1956] 3 All E.R. 338 and noted (1956) 19 M.L.R. 701.

public officer—an established civil servant—the Court of Appeal has generalised this ruling and laid it down that a *per quod* action will lie only in respect of the loss of a "menial" servant who could properly be regarded as a member of the master's domestic household.

Does this mean that if the employer continues to pay wages to the employee during the time when he is absent there is no means of recovery of those wages from the tortfeasor who has caused his absence? Clearly the employee cannot include them as lost wages in his claim against the tortfeasor, for, *ex hypothesi*, he has not lost them. But it is anomalous that the damages which the tortfeasor has to pay should be reduced because the man injured happened to have a generous employer or one who is under an obligation to pay wages notwithstanding absence through injury. Can the employer recover direct from the tortfeasor in an action of quasi-contract based on the principle of unjust enrichment?

The recent cases on this point have concerned loss of services of police constables who, under statutory regulations, have a right to continued payment of wages during enforced absence through injury. In 1948, Atkinson J. had held that the "employer"[5] was entitled to recover: *Receiver for the Metropolitan Police Dist.* v. *Tatum*.[6] The *Croydon Corporation* case (*supra*) is a test action brought to decide whether this decision is right. In an elaborate judgment Slade J. decided that it was. But three days later Lynskey J. in *Monmouthshire C. C.* v. *Smith* (*supra*) held on Assize that it was wrong and, in an equally elaborate judgment, dissented from the decisions of Atkinson and Slade JJ. All these judges would apparently have agreed that had the wages been paid voluntarily, and not under legal compulsion, there could be no recovery.

The immediate practical importance of the point is obvious and is highlighted by the statement[7] that in the Metropolitan Police Area alone some seventy claims are dependent on the result of the test action. The long-term results may be of even greater importance. The courts now have an opportunity, if they are prepared to take it, of laying down some intelligible general principles relating to quasi-contract, restitution, unjust enrichment or whatever they prefer to call it. The chaotic state of this branch of the law is about as great as that of the Rent Acts—and here we lawyers have only ourselves to blame and cannot make scapegoats of the politicians. Perhaps we shall at last emerge from the bow-and-arrow stage and follow our American cousins in producing something more worthy of a mature legal system.

[5] In this note the expression "employer" is used to describe the authority liable to pay wages; the peculiarities of police organisation can be ignored for present purposes.

[6] [1948] 2 K.B. 68.

[7] [1956] 1 W.L.R. at 1117.

Since this note went to press an unusually constituted Court of Appeal [8] has disposed of the appeals in both cases, upholding Lynskey J. and reversing Slade J.[9] Leave was given to appeal to the House of Lords.

L. C. B. G.

A LETTING LET-OUT

ON the face of it *Esdaile* v. *Lewis* [1] is concerned only with a short point of construction pretty well covered by existing authority. Nevertheless the practical importance of the point is enormous; it protects thousands [2] of people from eviction from their homes and deprives thousands of landlords of the opportunity of obtaining vacant possession in circumstances in which they might reasonably have expected it.

If a head-tenancy of rent-restricted premises comes to an end, the right of the landlord to obtain vacant possession (which will, of course, enable him to sell at a greatly increased price) depends, as against a sub-tenant, on whether the head-tenant has "lawfully sub-let." [3] This in turn depends on whether the sub-letting was in breach of the terms of the head tenancy. If it was, then, unless the breach was waived,[4] the landlord will be entitled to evict the sub-tenant. Hence rent books, which are designed to appeal to the landlords, who have to buy and supply them, almost invariably contain a printed provision prohibiting sub-letting. Unfortunately, the terms vary in expression. Sometimes they expressly prohibit "any sub-letting on the whole or any part." More often, in my experience, they merely say more succinctly "No sub-letting." In *Esdaile* v. *Lewis* the head-tenant's rent book contained a clause in the latter terms. The head-tenant nevertheless sub-let part without the landlord's consent. Later he surrendered his tenancy and the landlord sought vacant possession of the whole. The Court of Appeal held that he was not entitled to evict the sub-tenant who could remain as a rent-restricted tenant. "No sub-letting" merely prohibited sub-letting the whole; a sub-letting of part was not forbidden and therefore was "lawful." The court admitted that this construction was contrary to that which any normal person would adopt, but the

[8] The Lord Chief Justice, Morris L.J. and Vaisey J.

[9] *The Times*, December 5, 1956 (where the report appeared beneath the sardonic head-line "Cheaper to Knock Down Policemen").

[1] [1956] 1 W.L.R. 709; [1956] 2 All E.R. 357.

[2] No less than a quarter of the people advised at a recent session of a P.M.L. centre appeared to be covered by this decision.

[3] Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 15 (3).

[4] Hitherto the argument in these cases has turned largely on whether there has been a waiver. In many cases this will now become merely a second line of defence to the sub-tenant.

majority (Danckwerts J. dissenting) considered themselves bound by *Cook* v. *Shoesmith*.[5]

In the light of this decision, those advising landlords or tenants are likely to experience a number of practical problems which apparently did not arise in *Esdaile's* case. In the course of a lengthy tenancy there will have been a succession of rent books and the parties will normally not have bothered to ensure that these emanate from the same printers and are in identical terms. It may therefore easily happen that some of the books prohibit sub-letting in whole or in part, whereas others merely prohibit (on the *Esdaile* construction) sub-letting of the whole. Which rent book is then deemed to govern? Is it the first alone? Or can one argue that the terms must be deemed to be varied by mutual agreement each time the rent book is changed for one in a different form? Such an argument is totally unrealistic, for though the parties may conceivably pay some regard to the terms in the first rent book when the tenancy commenced, they are most unlikely to concern themselves at all with subsequent books which they will regard as merely repositories for rent receipts. On the other hand, the only rent book which is likely to remain in existence when the tenancy ends is the current one. On no argument, however, can this one be taken as decisive unless it was already in use when the sub-tenancy was created. In law the only possible choice is between the first rent book and that being used at the date of the commencement of the sub-tenancy. But often both books will, long since, have been destroyed. On whom, then, rests the burden of proof that there was any (and if so what) prohibition on sub-letting at the appropriate time? If it rests on the landlord he will never be able to evict a sub-tenant (even of the whole [6]) unless he has been so careful as to preserve the old rent books or is able to prove somehow that the relevant one contained an effective prohibition.

In practice it seems that county court judges adopt a common-sense solution and assume that the terms of the tenancy at the appropriate time were identical with the terms in the last rent book unless the contrary is proved. Time is, therefore, on the side of the landlords, for they merely have to see that on the expiry of a rent book not prohibiting sub-letting at all or merely forbidding sub-letting of the whole, the tenant is given one which expressly prohibits sub-letting of the whole or any part. And, since the printers will presumably at long last amend their forms, this is likely to occur without any conscious effort on the landlords'

[5] [1951] 1 K.B. 752, C.A.

[6] Unless the sub-tenancy of the whole was created after the original contractual head tenancy had been converted into a statutory one. In that event the head tenant, by parting with possession may have destroyed the statutory tenancy so that the sub-tenancy (though not expressly prohibited) falls with it. This complication (on which there are a number of decisions laying down some nice distinctions) need not be explored here.

part. Tenants, if they are forewarned (and of course they will not be) can frustrate this by examining any new book and refusing to accept it if it diverges from the terms of the old. But the real sufferers, the sub-tenants, have no means of protecting themselves thus. In practice they may lose their protection merely because the head-landlord has palmed off a different type of rent book on the head tenant. All one can advise them to do is never to take a sub-tenancy without examining the rent book of their landlord (the head tenant) and making a copy of its terms. Unfortunately they do not often seek legal advice when they obtain possession, but only when they are threatened with eviction.

If the Government really think that the rent control problem can be solved merely by progressive decontrol it is time that they thought again. An equally crying need is for legislation laying down basic terms for all weekly tenancies. As the foregoing may have shown, freedom of contract in this context is a mere pretence which leads to nothing but uncertainty and quarrels from which lawyers may benefit but everyone else suffers.[7]

L. C. B. G.

CY-PRÈS AND RESULTING TRUSTS

THE Court of Appeal in *Re Ulverston & District New Hospital Building Trusts*[1] has been once again at grips with the problem of *cy-près* and general charitable intent. The Ulverston Cottage Hospital had been built in 1872, and by 1924 it was evident that its facilities were inadequate for the needs of the Ulverston area. An appeal was launched in 1927, under the name of the Ulverston and District New Hospital Building Fund, for the erection of a new hospital, and fairly substantial sums were henceforth contributed annually by named and anonymous subscribers. A second public appeal for funds was made in 1930 but the response was disappointing. By 1937 the fund was receiving only £8 per annum and in 1942 contributions completely ceased. The hospital was never built and certain named donors asked for the return of their gifts. The trustees of the fund applied to the court for the determination of the question of whether the whole or any part of the fund should be applied *cy-près* (whether there was any general charitable intent), and alternatively whether the fund

[7] Of this, many other examples could be given. Perhaps the most important concerns liability for repairs; one of the reasons for the wasteful disrepair of small properties is that normally neither landlord nor tenant is under any clearly enforceable repairing liability so that nothing gets done until a sanitary or dangerous structure notice is served by the local authority. The new Rent Bill at least makes some attempt to deal with this problem in relation to tenancies remaining under control but, it is submitted, this falls far short of what is needed both in manner and scope.

[1] [1956] 3 W.L.R. 559; [1956] 3 All E.R. 164.

was held on trust for the donors on a resulting trust *pari passu* with their contributions.

Stone V.-C., sitting in the Chancery Court of the County Palatine of Lancaster, found that the sole object of the trust fund was the building of a new hospital at Ulverston and its maintenance. That purpose was now impracticable and the donors, so far as they could be identified, were entitled to the return of their money. The judgment of the learned Vice Chancellor was affirmed by the Court of Appeal. Counsel for the Attorney-General of the Duchy of Lancaster had argued that the subscribers to the fund did in fact have a general charitable intent, in that their main purpose in so subscribing was to improve the medical services in the Ulverston area. Jenkins L.J. who gave the leading judgment of the court (in which Hodson L.J. concurred), rejected this argument on the facts. Counsel further argued, basing himself on the observation of P. O. Lawrence J. in *Re Welsh Hospital (Netley) Fund*,[2] that as the fund consisted of contributions from anonymous and named subscribers, and as the anonymous subscribers must be deemed to have "devoted their money irretrievably to charity," it follows that subscribers who give their names and are aware that their subscriptions will be mixed with non-returnable contributions from anonymous sources, must be taken to have contributed with a similar general charitable intention—in fact "*cy-près* by infection."

Jenkins L.J. would have none of this. He distinguished *Re Welsh Hospital* and similar cases (for example, *Re Wokingham Fire Brigade Trusts*[3] and *Re British School of Egyptian Archaeology*[4]) on the ground that in those cases the court was concerned with the disposal of a *surplus* of trust moneys. But if the trust failed *ab initio*, as it did here, then there had been no effective application of the trust moneys, and a resulting trust must arise in favour of the named subscribers.[5] The recent decision of the Court of Appeal in *Re Hillier's Trusts*[6] where the hospital trusts failed *ab initio*, was not on all fours, as the court had found that the named donors had a general charitable intention, and it was legitimate to pray in aid *cy-près* by infection only if the court was in doubt on the facts as to the intention of the named subscribers (explaining the dictum of Lord Evershed M.R. in *Hillier*). Anonymous contributions are a factor in favour of a general charitable intent. This was not such a case. The sole object of the appeal was a new hospital at Ulverston.

His Lordship was doubtful whether even anonymous subscribers could in every case be imputed with a general charitable

[2] [1921] 1 Ch. 655, 658–660.
[3] [1951] Ch. 373.
[4] [1954] 1 W.L.R. 542.
[5] *Re Wilson* [1913] 1 Ch. 314, followed.
[6] [1954] 1 W.L.R. 700. The judgment of Upjohn J., in the court below, is at p. 9 of the same volume.

intention and he thought that it was at least arguable that such anonymous subscribers intended to contribute only to a specific charity, without forming any intention as to the disposal of the money if the specific intention could not be carried out. If the anonymous subscriber could prove that he contributed to the fund there should be a resulting trust in his favour; if not, the money would be *bona vacantia*, and on waiver of the Crown's claim (in accordance with the usual practice) would be applied *cy-près*. These conclusions are contrary to the judgments of Upjohn J. (who, however, left open the question of *bona vacantia*) and Denning L.J. in *Re Hillier*,[6a] both of whom held that anonymous subscribers donated their money irretrievably to charity, and it is submitted, are impliedly contrary to the views of Lord Evershed M.R. in *Hillier* and *Ulverston* and his limited acceptance of *cy-près* by infection.[7]

It is submitted, with respect, that the opinions of Denning L.J. and Upjohn J. are to be preferred on the grounds of administrative convenience.

Jenkins L.J. was further of opinion that the judgment of Denning L.J. in the *Hillier* case went "further than was necessary for the decision of the case"; Denning L.J. had expressed the view that a presumption should be made in favour of charity and that the court should impute to a named donor a general charitable intent [8] even if the object of the trust failed *ab initio*. Jenkins L.J. concluded that "in view of the strictly limited use made by Lord Evershed M.R. of the factor of anonymous contribution, and the dissenting judgment of Romer L.J., I cannot regard [the judgment] as representing the opinion of the court."

Both the *Ulverston* and the *Hillier* cases can be reconciled on their facts, and it is suggested that Denning L.J. would not have dissented from the decision in *Ulverston*. There was no evidence before the court in the *Ulverston* case as to the intention of the named donors concerning the trust fund if the trust failed *ab initio*. But there were named subscribers (it is not stated how many, and perhaps this might be relevant) who were demanding the return of their money. The court was compelled to take cognisance of the fact that such subscribers were not "as charitably minded as the poor widows who give their mites." [9] It is submitted that the fact that in the *Hillier* case no named donor had demanded the return of his gift which was "in marked contrast to the circumstances" of *Ulverston* is vital.[10] Such a demand would so far as these subscribers are concerned—in the absence of any contrary evidence—be sufficient to rebut Denning L.J.'s

[6a] Upjohn J. at p. 22; Denning L.J. at p. 715.
[7] Lord Evershed M.R. in *Ulverston* at pp. 573–574.
[8] [1954] 1 W.L.R. at pp. 715–716.
[9] Denning L.J. in *Re Hillier* [1954] 1 W.L.R. at 715.
[10] *Per* Lord Evershed M.R. in *Ulverston* at pp. 574–575.

presumption in favour of charity. The divergence of view between Jenkins L.J. and possibly Lord Evershed M.R. (who, although he agreed with the reasons stated by Jenkins L.J., made no express comment on this point and was more concerned with explaining his *cy-près* by infection dictum in the *Hillier* case) on the one hand, and Denning L.J. becomes vital in a case where the court is unable to determine whether the named donor intended to benefit charity generally or one particular charity alone, and where there is no demand by named subscribers for return of their gifts. Denning L.J. would then apply the out-and-out gift *cy-près*, whereas Jenkins L.J. would hold that "prima facie, the subscriber who gives his name intends to subscribe for the particular and exclusive purpose for which his subscription has been solicited and none other, and there will be a resulting trust in his favour if that purpose fails." [11] Lord Evershed M.R. would seemingly regard the fact that the named contributors knew that their contributions were to be mixed with anonymous gifts as relevant in rebutting this prima facie presumption in favour of a resulting trust—provided the intention of the donors was sufficiently equivocal.

The question might well be unreal and artificial. An ounce of evidence is here worth a ton of law, and it is evident that in the end the question of general charitable intent is a question of evidence and of construction of relevant documents in the light of surrounding circumstances. If so each case must stand alone on its own facts.[12]

In summary, the Court of Appeal has laid down the following rules in determining if there is a general charitable intent:—

A. If there is a *surplus* after the immediate purposes of the trust fund have been fulfilled, then the court will impute to both named and anonymous subscribers a general charitable intent as to that surplus, which will be applied *cy-près*. A resulting trust seems impossible to establish.[13]

B. If the trust fails *ab initio*,

(i) a general charitable intent will be imputed to anonymous subscribers, particularly of small sums, for example during flag days, and the money applied *cy-près*. Jenkins L.J. *dubitante*, is of opinion that if intent of such donors is impossible to determine (if possible, then a resulting trust will be implied) their subscriptions might be *bona vacantia*.

(ii) whether such a general charitable intent can be imputed to named donors is a question of evidence and construction, (for example, whether there has been an inclusion,

[11] At p. 567.

[12] See Harman J. in *Re British School of Egyptian Archaelogy* [1954] 1 W.L.R. 546, 553.

[13] *Quaere*, whether the *surplus* cases do raise a problem of general charitable intention since the money is vested in the charity, *per* Jenkins L.J. at p. 569.

in the fund of anonymous contributions). The court will bear in mind the realities of the situation and take account of the fact that named subscribers are or are not asking for the return of their money. If there is a demand, then this is very strong evidence in favour of a resulting trust. In the absence of any such demand Denning L.J. thought in *Hillier* that a presumption should be made in favour of charity. Jenkins L.J. in *Ulverston*, however, dissenting from Denning L.J. in *Hillier*, was of opinion that the presumption was in favour of a resulting trust to the donors. Lord Evershed M.R. *semble* agrees with this latter conclusion.

Re Cooper's Conveyance Trusts [14] also raises the question of *cy-près*, and is a further, though not novel, illustration that the problem of general charitable intent is ultimately a problem of construction and evidence.

By a conveyance dated April 13, 1864, certain land and property in Kendal was assigned in trust for the purposes of the Orphan Girls' Home at Kendal, and on failure of this said trust the trust property was to be held on trust for the person or persons entitled to certain mansion house land. The orphanage had been maintained largely by the Ministry of Education, who in 1953 withdrew their support. In June, 1954, the orphanage finally closed.

Upjohn J. held that the gift over was void for remoteness. His Lordship was of opinion, following the *Re Bowen* [15] line of cases that the gift to the orphanage could only be applied *cy-près* if it could be construed as an out-and-out gift and not a gift limited in duration. The gift in this case was peculiar in that it was not "expressed to be in perpetuity nor, on the other hand, limited in duration." The "construction of the relevant documents in the light of the relevant surrounding circumstances" lead his Lordship to the conclusion that the gift was a gift of limited duration, which failed with the determination of the charity. There was accordingly a resulting trust to the next-of-kin of the donor.

GARETH H. JONES.

PRIVATE INTERNATIONAL LAW—ADOPTION

IN *Re Wilson* [1] Vaisey J. held that a child adopted according to a foreign law could not succeed to the movable property of his adoptive father, when the latter had died substantially intestate

[14] [1956] 1 W.L.R. 1096.
[15] [1893] 2 Ch. 491.
[1] [1954] Ch. 733. See also *Re Wilby* [1956] 2 W.L.R. 262, which virtually follows *Re Wilson*. In this case the reader is entitled to be told (what does not appear from the report) that the adoption in question was void, being an adoption between Christians domiciled in a country which then allowed Adoption to Hindus or Buddhists only.

domiciled in England. He did not consider *C. S. Nataraja Pillai* v. *C. S. Subbaraya Chettiar*,[2] a decision of the Judicial Committee of the Privy Council, five years before, which was the result of mature deliberations (the appeal having been heard twice by the Board) and which awarded to a child adopted according to a foreign law the immovable property of his adoptive mother, who died intestate domiciled abroad, notwithstanding the fact that the *lex loci rei sitae* did not admit the adoptee as an heir. Since, apart from other issues of interest to academic writers on Conflict, this decision contradicted the fundamental rule [3] that the descent of immovables is governed by the *lex situs*, both the facts and the *rationes* deserve careful analysis.

V, the widow of a Hindu who died domiciled in French India (Pondicherry), went about half a century ago to Madras (then in British India) and there adopted a boy, S, whose domicile up to that time seems certainly to have been in British India, although the latter point was not judicially investigated but appears simply from the facts. According to the law of her own domicile V was entitled to adopt a boy without either her husband's or any other person's consent, and if she adopted, he would on her death intestate inherit not only her own acquired property but also the estate which she had inherited from her husband. According to the law of Madras, on the other hand, a Hindu widow could adopt only with the appropriate consent or consents and the adopted son would be a son of *her husband* in the eyes of the law and would divest her of her deceased husband's estate.[4]

After V's death S sought to obtain possession of her immovable estate located partly in French India and partly in Madras. The fact of his adoption was disputed and also V's right to adopt S, but in the French courts the validity of his adoption was upheld in litigation which persisted as far as the Cour de Cassation in Paris, and S was put in possession of the lands in French India. After much litigation in British India, in which S was generally successful, principally by virtue of his success in the French courts, persons in possession of certain of the Madras lands appealed to the Madras High Court [5] on the grounds that the burden of proof lay on S to show that he was entitled to the estate before they could be dispossessed; that S was not a validly adopted son of V's husband or of V herself according to the law of Madras; and that, since the *lex situs* governs the descent of immovables, lands in Madras could not descend to a claimant not there recognised as an heir. S himself had nearly twenty years previously abandoned his claim to be a son of V's husband (obviously because he could not prove the consents required for that purpose) and

[2] (1949) L.R. 77 I.A. 33; s.c. [1950] 1 Mad.L.J. 172 (P.C.).
[3] Dicey, 6th ed., Rule 123 (2).
[4] A.I.R. 1954 S.C. 379.
[5] I.L.R. [1939] Madras 507.

he relied solely upon the validity of his adoption by V and the status thus created, both possible only at French law and established by the litigation in French courts.

A bench of the High Court, consisting of the Chief Justice, Sir Lionel Leach, and Madhavan (later Sir Madhavan) Nair J., both subsequently members of the Judicial Committee, found for S on the following grounds:—

(1) Under French law (as was admitted) a widow could adopt to herself and make the boy her heir-at-law;

(2) Succession to the estates of foreigners is governed by the Indian Succession Act *except* where they are Hindus, Muslims, etc.[6] This is because the Act specifically excludes such persons. Therefore the succession to V must be determined by Hindu law, her "personal law";

[6] *Khatubai* v. *Mhd. Haji Abu*, I.L.R. 47 Bombay 146, P.C. This Privy Council case would seem at first sight to have been a precedent binding upon the High Court. This is not so. A Muslim belonging to the Halai Memon community domiciled in Porebunder (*i.e.*, abroad) died intestate in Bombay. The question was whether his estate in British India (which seems to have been, and probably was, exclusively movable) descended according to the Islamic law, which applied in the case of Halai Memons domiciled in Bombay, or the Hindu law, which was applied to Porebunder Halai Memons by the courts of Porebunder. Since he was a Muslim the Succession Act did not apply, and it appeared at first sight that the Islamic law should be applied. Lord Dunedin held that "so far as the question for decision in the present appeal is concerned" the personal law must be applied, and that was the law as applied to persons of the same description in Porebunder. It is to be observed that there is no evidence that the estate included immovable property, and this case was not discussed in *Nataraja's* case or treated by their Lordships of the Privy Council as a precedent. And it must be pointed out that "personal law" has a special meaning in India, which must be stated in order to obviate the suggestion of a *renvoi* here. Every *propositus* who is not governed as to descent and distribution by the Indian Succession Act is governed by his personal law, which may be Hindu law (one of several possible varieties regularly applied by the British Indian courts), or Islamic law of at least two possible schools; or proof may be made of the applicability of one of a collection of innumerable customary laws in derogation of the Hindu or Islamic law. Parsi law is separately catered for. In the case of many Indian Muslims (particularly prior to 1937) Hindu law applied by custom. Thus the Indian courts took judicial notice of the applicability of Hindu law to certain classes of Muslims. In *Khatubai's* case the Succession Act pointed to the "personal law" without indicating which law it should be. The Islamic law could not be applied because the heirs were able to prove that their particular community was not governed by Islamic law at all but by rules analogous to Hindu law: hence the court was obliged to treat the *propositus* not as a deceased Muslim but as a deceased Hindu. In *Nataraja's* case, however, there was never any question that V was governed by a special custom in derogation of the Hindu law whereby she was entitled to adopt to herself without consents, etc., for customs of this character (which no doubt exist) can only be proved with respect to a *caste*, and V belonged to a caste indubitably governed in British India by the ordinary Hindu law as administered in Madras State. This is a vital distinction, not less important than the fact that no immovables appear to have been involved in *Khatubai's* case. French Indian Hindu law may be the "personal law" of French Indian Hindus in contradistinction from the civil law of French India: it is a foreign law from the point of view of British Indian courts, like Japanese law. See also T. S. Rama Rao, "Private International Law in India," (1955) 4 IYBIA, 219, 224–226.

(3) Because the personal law is the basis of decision the rule in favour of the *lex situs* is excluded. The *lex situs* is the Succession Act, and this does not apply for the reason stated above; and

(4) British courts recognise a declaration of status by the courts of the domicile in a matter of succession to movables; and where the personal law must be applied such declaration must be valid as to immovables also. "No reason exists for making any distinction."

It is necessary to point out that their Lordships failed to observe, or in the interests of law reform ignored, (*a*) that the rule indicating the personal law operated normally *within* British India in regard to migrating Hindus only (they cite Mayne's *Hindu Law and Usage* at a passage which, upon inspection, is found to relate merely to this well-known rule [7]); (*b*) that the reference to Hindu law in the Succession Act (by exclusion of Hindus from its operation) does not authorise the British court to apply a *foreign* Hindu law; (*c*) the *lex situs* is in reality the law chosen to apply to the succession and among such laws the Succession Act is only a possible alternative; and (*d*) that the French courts might be admitted to be courts of the domicile of S only if he had been validly adopted according to British Indian law, a contention which he himself had long ceased to make; for as an unadopted child he retained his Madras domicile.

In the Privy Council S succeeded again. In the course of the Advice, delivered by Lord Greene, the following *rationes* appear:—

(1) The widow's capacity to adopt a son to herself and the status of the child so adopted were matters to be determined in accordance with the law of *her* domicile.

(2) Apart from the French decisions the appellants had admitted in the High Court V's right to adopt to herself with the *classes* [8] of effects claimed by S.

[7] (1920) L.R. 47 I.A. 213. *Mailathi Anni* v. *Subbaraya*, I.L.R. 24 Madras 650, is readily distinguishable, since there the court refused to convert into a limited estate the inheritance which had passed absolutely to a French Indian Hindu widow, who migrated to British India after her husband, the *propositus*' death.

[8] A hasty reading of the Advice might suggest that their Lordships believed that counsel for the plaintiffs-appellants had admitted that by French law S was entitled to the Madras lands and that French law must be applied. Naturally he cannot have made such a fundamentally damaging admission, and if he had the court would not have been absolved of its duty, since admissions of counsel as to law stand upon an entirely different footing to admissions of fact. Counsel must have admitted that *if* French law were applicable in respect of immovables, which he denied, S's claim could not be resisted. And this, as Lord Greene points out, was a correct statement of the French law on the point. The authority, which is not mentioned in either judgment, may be sought in Léon Sorg, *Traité théorique et pratique* (Pondicherry, 1897), 127.

(3) From the circumstances the court might *infer* that the requirements of French law had been complied with, and the French judgment must be considered strong and uncontradicted evidence thereof.

(4) The argument that to succeed to immovable property in British India the adoptee must have been validly adopted according to the municipal law of British India could not be accepted, since the status of S fell to be determined by French law.

(5) The law of S's domicile had made him heir to V and there appeared "no reason in principle why a person who by the law of *his* [9] domicile and thus (as is admitted) by the law applicable in British India must be regarded as the adopted son of the owner of immovable property in India should be regarded as incapable of succeeding thereto any more than he would be incapable of succeeding to movables."

This decision is therefore authority for the following propositions:—

(*a*) The *lex loci adoptionis* does not govern the effects of adoption.

(*b*) The *lex situs* does not determine the heir to immovable property, *or*, the *lex situs* is bound to include foreign law where the *propositus* was last domiciled abroad (a doctrine which seems virtually to emasculate the *lex situs* rule).

(*c*) The status of adopted child can be created if the adopter has the right to adopt according to his own *lex domicilii*, without reference to the law of the domicile of the adoptee prior to adoption.

(*d*) All an adopted child's rights of succession are to be determined solely by the *lex domicilii* of the adopter, provided that that law holds the child to have been validly adopted, even if the *lex fori* would deny the validity of such an adoption.

It would follow therefore that we have strong suasive authority for the proposition that if A adopts B in Italy and dies domiciled in Italy leaving immovables in England, the English court must hold B entitled to that property, notwithstanding the fact (established in *Re Wilson*, *supra* [10]) that the Administration of Estates Act and the Adoption Act read together (unquestionably our only *lex situs*) do not contemplate adoptions outside the British Isles. Moreover, if C, domiciled in Switzerland, goes through a form of adoption of an English child in England whilst without capacity to adopt according to English law and dies intestate leaving immovable property in England and in Switzerland, an English

[9] My italics. *His*, *videlicet*, because he was validly adopted according to his alleged adoptive mother's.

[10] And again in *Re Wilby*, *supra*.

court must put the child into possession of the English immovables if a Swiss court had upheld the validity of the alleged adoption. But this conflicts with the *ratio* of *Re Wilson*, which was to the effect that an adoptee's rights of succession are governed by the municipal law limiting the succession. England has not yet abandoned the *lex situs* rule [11] and the rules of English Private International law are binding in India under the head of Justice, Equity and Good Conscience.[12] Yet *Nataraja's* case has recently been followed in India [13] and, though it can be overruled in India and Pakistan, it is still a binding authority in a great part of the Commonwealth. This is unfortunate since, it is submitted, the decision is vitiated by a circularity of reasoning: "Is this adoption valid?"—"Yes, because the foreign court says so."—"What effect shall we give to this adoption?"—"The effect the foreign court has given it."—"Upon what basis have they given it effect?"—"Upon the basis that they have found the adoption valid." Accordingly the municipal law is silenced and the forum deprived of its independent jurisdiction. Perhaps this is desirable from a broad view of international relations, but it would seem that treaties implemented by statute are the proper means of achieving that object.

J. Duncan M. Derrett.

Tort Immunity between Husband and Wife

In *Tooth & Co., Ltd.* v. *Tillyer*,[1] the Australian High Court has pronounced on another aspect of the problem considered by the Court of Appeal in *Broom* v. *Morgan*.[2] In that case, the Court of Appeal had to decide whether the immunity of a husband from actions in tort at the suit of his wife extended to the employer of the husband who would otherwise have been liable for the tort in question. The Court of Appeal held (agreeing with decisions of the New York Court of Appeals and of the Supreme Court of New South Wales) that the employer was liable in such circumstances, but it is not easy to extract clear and agreed reasons for the decision from the opinions of Singleton, Denning and Hodson L.JJ. In *Tooth's* case, the High Court had to decide whether an employer could recover over against a husband for negligent injury inflicted by the husband upon his wife in circumstances making the plaintiff liable to the wife under the New South Wales Workers' Compensation Act; section 64 of that Act enables an employer who has paid compensation in respect of an employment accident

11 See references in 7 Halsbury (3rd ed.), 50–51.
12 (1887) L.R. 14 I.A. 89, 96. See T. S. Rama Rao, *cit. sup.*
13 57 Bom.L.R. 1026; s.c. A.I.R. 1955 Bombay 49.
1 1956 A.L.R. 891.
2 [1953] 1 Q.B. 597.

to recover against any person under "a legal liability" to pay damages in respect of the same harm. To the obvious answer that the husband was not under "a legal liability," either at common law or under the Married Women's Property Acts, the employer argued that *Broom* v. *Morgan* and similar cases rest at least partly on the view that the immunity of the husband from suit by his wife is merely procedural, and that some sort of "liability" exists in the husband. The court reviewed the decisions and also relevant articles by Professor Kahn-Freund,[3] Messrs. Hughes and Hudson,[4] Professor Hamson,[5] Mr. E. C. Todd [6] and the present writer,[7] and the editorial note in (1953) 69 L.Q.R. 296. The court also referred to the common law history of the doctrine that "husband and wife are one," and suggested that "the conception of the unity of husband and wife was but an *ex post facto* explanation and not a source of the state of early English law upon the subject." But their Honours concluded that the husband was under no "liability" to the wife for the purpose of the Act in question: "We may be certain that the notional 'liability' which in America, and now to some extent in England, has been discovered or devised as something which is concealed under the delictual immunity attaching to husband and wife mutually had no place at common law nor in the minds of those responsible for the provision embodied in section 64. Such a metaphysical unreality is not characteristic of common law doctrine relating to wrongs." The High Court therefore rejects a main basis upon which the views of Singleton and Hodson L.JJ. rested in *Broom* v. *Morgan*, and one of the grounds adopted by Denning L.J. It did not, however, deal with the other ground suggested by Denning L.J., namely that the employer's liability in such cases is not vicarious but primary; that consideration is irrelevant to the workers' compensation problem.

G. S.

[3] 10 M.L.R. 376.
[4] 31 Can.Bar R. 32.
[5] 12 Camb.L.J. 45.
[6] 27 A.L.J. 498.
[7] 27 A.L.J. 323.

CORRESPONDENCE

The Editor,
The Modern Law Review.

November 27, 1956.

Sir,

Apropos of L.C.B.G.'s note on the implied warranty for fitness at pp. 544–545 of your issue of September, 1956, it might be of interest to recall a case brought before Governor Sancho Panza. A tailor was arraigned for making five caps out of a valuable material supplied by the customer, caps large enough for being put on the fingers of the hand, but not large enough for wearing on the head. The defence was that the tailor had made caps to order, and that there was no warranty on his part that these could cover the head. The customer had, after inquiry from the draper, purchased cloth to the measure of one cap for his head, but thought that the tailor would perhaps cheat him out of part of the cloth. So he asked if two caps could not be made out of the same material. The tailor replied that this could be done. The customer went away, but his suspicion of the tailor or perhaps his own avarice got the better of him. He returned and inquired if three caps could possibly be made. The tailor again answered in the affirmative. The customer left the shop, but soon enough returned to ask for four caps to be made. Again the tailor agreed; and this was repeated for the fifth time. The tailor was held not to blame.

Is not this the parental case for the suits of the nature commented upon? Did Cervantes foresee all of them hundreds of years ago? Are not the human problems very human after all?

Yours truly,
C. M. Shafqat,
Senior Civil Judge.

Sheikhupura (Pakistan).

REVIEWS

The Federal Loyalty-Security Program. Report of the Special Committee of the Association of the Bar of the City of New York. [New York: Dodd, Mead & Company. 1956. xxvi and 301 pp. $5.00.]

Sooner or later the basic common sense of the American people reasserts itself. And for the past two years it has begun to reassert itself strongly against the excesses which legitimate resentment of the Communist threat had persuaded it to countenance for too long. At first it was difficult to be sure that the tide really had turned against the wave of suspicion and intolerance which had swept over the country. The removal from a position of influence and publicity of the arch-demagogue who had swum in on the crest of the wave seemed to be little more than the fortuitous result of a shift of the balance of power in the Senate and of resentment of his manners rather than of his opinions and methods. But it was soon apparent that this was one of many straws in the wind. The voice of true liberalism—shocked into silence by the *Hiss* case—is again being heard and listened to, and quietly but firmly the American public is beginning to make it clear that it is not prepared to forfeit its birthright of freedom of speech and conscience.

One of the many signs of the receding tide was the appointment in the spring of 1955 of a special committee of lawyers to review the Federal Security Programmes. The Committee was appointed by the Association of the Bar of the City of New York—a body with a deservedly high reputation for enlightened public spirit—and was financed by another admirable organisation —the Fund for the Republic. The Committee was an exceptionally strong one, with members drawn from many different states and cities of the Union—New York, Chicago, New Orleans, Washington D.C. and Los Angeles—and aided by a staff which included Professor Elliot Cheatham of Columbia. They conferred with a wide range of persons in all walks of life. The influential report now published deserves the closest attention not only in America but throughout the Free World—and beyond. It has lessons for us all. Happily it has already received considerable publicity in the British Press, and here attention can only be drawn to certain of its salient points.

There are at present seven separate Federal security programmes now covering some 9,000,000 civilian and military personnel, of whom 6,000,000 are civilians.[1] It is with these programmes that the Committee was concerned. In addition, there are state requirements for loyalty oaths which are indirectly affected by the Federal programmes since they are linked to the Attorney-General's List of "subversive" organisations.

Having reviewed the various Federal programmes in detail the Committee sum up (at p. 133) their conclusions on the achievements and intangible costs in two short paragraphs that are worth quoting in full:

> "It is probable that some undesirable and even dangerous persons have been ousted or barred from employment in Government or industry. It is likely that important scientific and technological developments have been withheld from an aggressive enemy, but the consequent slowing down of his potential for aggression was of short duration. It seems clear that the reputation of the Government service has been cleared of the imputation

[1] The number of persons covered by them from their origin is several millions larger: see p. 116.

of grave subversive infiltration, with improvement of the morale of some of the employees. Similarly, it is suggested that the security clearance has somewhat facilitated the prompt operation of the work of the Government.

"On the other side of the balance there has probably been some impairment of positive security through the slowing down of scientific and technological advancement. There has been an injury to our international repute and security from the maintenance of a system which seems to our friends abroad to go beyond the true needs of national security. There has probably been some injury to the morale of the government service and certainly needlessly severe burdens to a considerable number of individual employees who have been unnecessarily suspended, tried and subsequently cleared. And there is some evidence of a general blunting of our national concern with freedom of speech and fair hearings, although that is clearly on the rise again."

They then make proposals for far-reaching changes, saying (at p. 24): "We deem it appropriate that members of the Bar should do this. Indeed, as we conceive it, our duty as lawyers requires us to do so. The Bar in the United States has always been, and must always be, alert in the protection of the liberties on which our country was founded as well as of other measures essential to national security. It is so, in fact, with lawyers in every country where freedom exists or is emerging." This is well said, and it is to be hoped that lawyers everywhere are in fact mindful of these duties. As this quotation shows, the Committee are rightly conscious that their duty is not merely to minimise restraints on liberty but also to maximise efficiency in measures of national security. Their proposals are the more weighty because of the emphasis which they place on the latter. An attempt to screen nine million people is objectionable not only because the vast majority will be subjected to undeserved scrutiny but because it is so easy for the small unreliable minority to escape detection.

The Committee find weaknesses in four aspects of the programmes.

1. There is a lack of co-ordination and supervision of the various programmes.

To correct this they recommend the appointment of a Director of Security in the Executive Office of the President to conduct a continuous review of and supervision over the various programmes and over the classification of information.[2]

2. The scope of the programme is too broad in that positions are covered which have no substantial relationship to national security.

The Committee's proposals would restrict the need for clearance to sensitive positions and no others, *i.e.*, to personnel (*a*) who have access to material classified as top secret or secret (not confidential) or (*b*) who have a policy-making function which bears a substantial relation to national security. This would reduce the number of civilians subject to the programmes from 6,000,000 to less than 1,500,000 and would entail the total abolition of the especially objectionable programmes for Port Security and for International Organisations' Employees.

3. The standards and criteria for security clearance do not sufficiently recognise the variety of elements to be considered, including the positive contribution which the employee may make to national security, and they do not readily permit a common-sense judgment on the whole record.

The present standards rightly emphasise reliability rather than loyalty[3]—though unfortunately this is not fully recognised by public opinion, which tends

[2] The Report emphasises the importance of proper classification and the tendency to, and dangers of, over-classification (pp. 69 *et seq.*). The value of its observations on this topic is certainly not limited to the U.S.A.

[3] Except, most anomalously, in the case of employees in International Organisations, where the test is that of loyalty to the United States.

to treat a refusal of clearance as a verdict of disloyalty.[4] But they are insufficiently explicit in the breadth of the factors to be weighed in reaching a determination, and they are unsatisfactory in that the security officials must generally be convinced that retention in the public service is "clearly consistent" with national security. As the Report says (at p. 151): "In the hands of a literal minded hearing board or administrator, the "*clearly* consistent" test may produce results contrary to common sense, unfair to the employee, and opposed to the long range interests of the nation." Though the Committee do not say so, it is reasonable to suppose that they had the *Robert Oppenheimer* case in mind when they made this observation.

The Committee recommend (see pp. 9 and 149 *et seq.*) that the standard shall be expressed thus:—

> "The personnel security standard should be whether or not in the interests of the United States the employment or retention in employment of the individual is advisable. In applying this standard a balanced judgment shall be reached after giving due weight to all the evidence, both derogatory and favourable, to the nature of the position, and to the value of the individual to the public service."

On the vexed question of "guilt by association" (as it is often misleadingly called) the Committee say, very sensibly: "A person's associations with organisations or individuals may properly be considered in determining his security suitability. But [an adverse conclusion] should not be reached without adequate basis for determining that he shares, is susceptible to, or is influenced by, the actions or views of such organisations or individuals." The Attorney-General's List should be abolished unless it can be revised so as to be kept up to date, indicate the period and nature of the subversive activities of each organisation, only include organisations which have been given an opportunity to be heard, and contain a statement that mere membership of an organisation, not declared illegal by statute, shall not establish the subversive character of the individual. It seems likely that the burden of maintaining the List on this basis would be such that abolition may prove more acceptable to the authorities. From every point of view this is probably the better alternative. Unhappily quite disproportionate weight has in the past been placed on the List and, notwithstanding the suggested explicit statement to the contrary, it will be difficult to disabuse the mind of the public of the belief, sedulously fostered by certain elements, that membership of a named organisation is *per se* evidence of guilt. It is difficult to see what real use the List would fulfil having regard to the further proposal of the Committee that the Department of Justice shall on request make available relevant evidence in its files concerning all organisations whether defunct or not, the character of which may be pertinent in a pending inquiry.

4. The security programmes fail in various respects to protect as they could the interests of the Government and of employees.

The Committee's important proposals to counteract this weakness cannot unfortunately be adequately summarised in the space here available. They include recommendations for better training of security officers, for the establishment of detailed procedures for screening, formulation of charges, hearings and calling of witnesses and confrontation. They deal with the right to legal representation at all stages and with arrangements for the treatment of charged employees pending disposition of charges. In a word, they seek to make the investigations both more thorough and more fair and to ensure procedural due process.

[4] The Report suggests that this is a relic of the earlier programmes where the test was loyalty rather than reliability. But confusion in this respect seems to be ineradicable; it was certainly displayed in England in the comments on the *Lang* case.

In this sphere we in Britain have tended to be complacent—a complacency which recent events have shaken somewhat. The *Burgess and Maclean* case showed that our security checks were seriously deficient. They were tightened up, but in the process too little attention may have been paid to the protection of the individual. It is probably true that we deserve our reputation for maintaining civil liberties without reliance on constitutional or legislative safeguards and probably the time has not yet come, and God willing it never will come, when we need an elaborate code on the lines recommended by the Committee. But constant vigilance is needed—especially vigilance from the legal profession—and we cannot afford to view the American picture with smugness. The comment of more than one American observer of the recent case of the I.C.I. solicitor was that in the States Mr. Lang would have obtained greater satisfaction than he did here. Even under the existing American programmes he could have obtained a clearer formulation of the charges about him; under the Committee's recommendations he would have been entitled to know the nature of the evidence and to be confronted by the witnesses on whose evidence the Ministry relied unless the hearing board decided that this would be injurious to national security. It is not suggested that the result of the *Lang* case was unjust—the whole point is that no one has the information necessary to decide whether it was just or not. Our tradition of fairness in matters of this sort justifies us in hoping that the Ministry's decision was correct. But one cannot help regretting that if justice was done, it was not also manifestly seen to be done. If, unhappily, there should be further cases of a similar type, it is to be hoped that the authorities and the "three wise men" will seriously consider whether greater disclosure cannot be made without detriment to national security. Governmental reputation for fairness has suffered because of an over-readiness to claim privilege for information on Ministerial files. If those concerned read this Report, as it is hoped they will, they may be encouraged to believe that in the long run it is in the interests of national security and confidence to place one's cards on the table and that normally the only justification for refusing to do so is if this might lead to the identification of a regular under-cover agent.

L. C. B. G.

Matrimonial Property Law. Edited by Professor W. Friedmann, University of Toronto School of Law. Comparative Law Series, Volume 2. [London: Stevens & Sons, Ltd. 1955. 472 pp. 63s. net.]

Comparative Studies in Community Property Law. Edited by Jan P. Charmatz and Harriet S. Daggett. [Louisiana State University Press. 1955. ix and 190 pp. $6.00 net.]

Matrimonial Property Law is the second volume in the Comparative Law Series of the University of Toronto School of Law. Like the first volume (a symposium on The Public Corporation) and the third (on Anti-Trust Laws), the present volume is edited by the indefatigable Professor Friedmann. It is to be hoped that Professor Friedmann's translation to the Columbia University will not mean the cessation of this series, the chief value whereof lies in the examination of some problem of universal legal significance by the collation of reports setting out the solution reached by a particular legal system, these reports being prepared by experts in their own systems. The result is of great service to the teaching of comparative law in that it supplies an authoritative textbook for the use of students unable often to read any language other than English. Indeed, few teachers of law could claim the linguistic versatility needed to amass unaided such a mine of information from

so many systems as is to be found within the covers of each volume in this series.

The Editor divides the present volume into four parts. In the first are placed the States which adopt a system of community of property between spouses: France, Louisiana, New Mexico and western United States, Quebec, South Africa and the USSR. In the second, England, New York, and the common law provinces of Canada are included as representative of systems of separation of property. The third part is concerned with the so-called intermediate systems of Germany and Sweden, while part four concludes the volume with a short but penetrating comparative analysis by the Editor.

It would be presumptuous to venture upon a detailed criticism of each of the learned articles which make up this book, yet some general observations upon certain of the contributions may be permitted after a complete and careful reading of the whole.

Many readers will doubtless turn first in this book to the account of matrimonial property law in the USSR which is written by Professor Hazard. What is interesting about the Soviet law here is its adherence to traditional civil law concepts. Even as an instrument of revolutionary policy this branch of the law thought fit to return (in 1927) to a form of community of acquisitions, while peasant households preserved from the first the customary community system which had prevailed under the Tsars. The principle of community is overlaid with many exceptions to which the courts seem very ready to add where social policy requires it, so that "an outsider obtains the impression that the subject of marital property is still developing on a basis almost like that of growth in the Anglo-American common law." There is an interesting sidelight to the English case of *Hoddinott* v. *Hoddinott* in the argument of a Russian legal writer that lottery winnings on a State bond owned by one of the spouses belonged to the spouse in whose name the bond is registered and do not become part of the community property, even though these bonds are usually purchased from wages which are community property under the Code. The whole account makes a fascinating commentary on the increasing emphasis in official Soviet policy that the woman's essential role is that of homemaker: this concern for stable family life is a long road from the early salad days of divorce by consent or even unilateral declaration.

A sense of disappointment was left by the account of the French law from the distinguished pen of Monsieur Marc Ancel. M. Ancel well remarks that French matrimonial law corresponds in some respects in its extreme complexity and technicality to the law of real property in England. Certainly, the foreign student who can master English real property will have received an awful initiation into the mysterious thought processes of English lawyers. Conversely, the common lawyer who wrestles with Title V of the Code Napoléon and the attendant gloss of case law and practice will penetrate to that inmost shrine of the *Droit civil* which remains a closed door for those who busy themselves with such externalities as the system of civil courts and the theory of sources. The votaries of this branch of French law are, of course, the notaries, and perhaps it is only from the *notariat* that the practically minded common lawyer could expect a satisfactory answer to the queries raised in his mind by the articles of the Code and their treatment in the textbooks. As the conveyancers for real property, so the notaries for Title V convert the abstractions of the law into a working piece of social machinery; at the present day they do more, for by a kind of notarial equity they temper and even distort certain of the texts which are felt to have fallen behind in the race between legislative reform and social progress: a notable example is the amelioration of the plight of the surviving spouse by certain practices *en dehors des textes*. Of all this M. Ancel's somewhat formal account of the French law leaves the reader unsuspecting. Perhaps one could not ask for so much within the compass of twenty-eight pages. Even as a formal account, however, this statement of the law can be criticised as presupposing too much of the reader. Thus, the *institution contractuelle* is inadequately

explained (p. 9); in this explanation the term "disposable quantity" is employed, which surely begs another explanation for the uninitiated. At p. 13 confusion is inevitable when we read: "There are usually in the community three masses of distinct assets: the common property belonging to both spouses, the personal property of the husband and the personal property of the wife. The assets which do not fall in the community and remain the personal property of the spouses are called the separate property." This only becomes meaningful when it is realised that the word community means at its first appearance communal régime and at its second common property. The fault is often one of translation and his translator has served M. Ancel very ill. Surely the English equivalent for *Ancien régime* is not Ancient Law but *Ancien régime* (p. 4); expressions like "indivision" (p. 5), "search of paternity" (p. 6), "the sales price" (p. 17), and "bare ownership" (p. 24) are in their context inelegant or obscure or both. At p. 23 "lawful parents" must mean lawful relatives, a schoolboy mistranslation of *parents*. It suggests, moreover, an unfortunate unawareness of English legal terminology to translate *biens* as "goods" (p. 19) when they include immovables. The persistent use of personal property to mean separate property is likewise unfortunate.

The English law is presented with great sociological insight by Professor Kahn-Freund; witness his striking opening paragraph of which the first sentence summarises the contents of the whole book: "The main problem which every system of matrimonial property law has to solve is the reconciliation of the needs of the household as an economic unit with the ideas of individual ownership on the one hand and with the claims of the spouses' kinship groups on the other." This triangle of social forces has to be held in a constantly shifting equilibrium by the law.

In England, as elsewhere, community of property is "non-U," separation of property "U." For, as Professor Kahn-Freund points out,

> "The lower the status of the spouses in the social and economic hierarchy, the larger will be that proportion of their possessions which is destined to personal use and consumption, the more comprehensive consequently the transformation of their property situation by their marriage and by the establishment of a household. The economic substratum of the household community: the family home, household furniture, household savings, and current earnings and other income used for the satisfaction of daily needs, are usually the total or the bulk of the property and income of working class and small middle class families, while they play a comparatively insignificant role among the possessions of the upper classes."

Historically, the common law was communistic, although it centred property rights in the husband. It was equity which developed the separate estate to meet the requirements of the mercantile and capitalist society which began to develop in the sixteenth century. "The purpose of equity was to keep the family (kinship) property intact and to preserve it from being sacrificed to the husband's speculative undertakings or extravagant habits or fancies." With equity as "pacemaker" and pioneer in technique the legislature introduced in 1882 a universal matrimonial régime of separation of property. Professor Kahn-Freund explains that the principle of the equal status of the sexes (with which most would agree) had in English law become entangled with the more disputable principle of separation of property, and that the first could only be achieved through the second, although equality of status is perfectly compatible with a system of community.

The learned writer proceeds to demonstrate how the seeming absoluteness of the separation system is subject to numerous qualifications—many assets are expressly or impliedly brought by the spouses into co-ownership; the wife, *qua* housewife, has the right to pledge the husband's credit for necessaries; the husband is debarred from suing the wife for the conversion of, or trespass to, his property, though the wife may sue the husband; consorting spouses cannot commit larceny from each other; the rigour of the principle of

separation may be tempered by section 17 of the Act of 1882, in the application of which the judges have often been inspired by the idea of community, for example, in the development of the wife's "equity" to remain in the matrimonial home belonging to the husband; more important is the law of intestacy, which, since 1952, introduces for small estates a principle of universal community after death, while in every intestacy the "personal chattels" pass to the survivor. "If the present law of matrimonial property (the principle of separation) and the law of intestate succession are viewed as one (as they ought to be), the gulf which separates English law from a system of community *mortis causa* is less wide than appears at first sight."

Finally, the writer shows how, for the purpose of family maintenance and social security, the English law has recognised the reality of the household community. In this section, which is a masterpiece of compression, the complex amalgam of the modern law of maintenance is analysed historically into its constituent elements of common law, poor law, ecclesiastical law, and modern legislation. Inevitably, a few errors of detail have crept in: thus, section 3 of the Vagrancy Act, 1824, is no longer in force as stated (at p. 305, note 20), being replaced by section 51 of the National Assistance Act, 1948; the Poor Law Act, 1927, was not (as suggested at p. 305) the first statute to include the husband among the persons whose liability of maintenance could be enforced by the Poor Law authorities: the husband's liability in this respect is the subject of section 33 of the Poor Law Amendment Act, 1868, while a wife with separate property was made liable to the parish for her husband's maintenance by section 13 of the Married Women's Poperty Act, 1870; the statement (at p. 309) that "the wife's right to be maintained by the husband can be enforced by her (as distinguished from the assistance authorities) only after either proceedings for divorce, separation, or restitution of conjugal rights have commenced or else the consortium has (for the time being at least) come to an end" must be qualified by her presumptive right, even during consortium, to pledge his credit for necessaries; and it might well be mentioned that the Summary Jurisdiction Acts empower justices to make separation as well as maintenance orders. Professor Kahn-Freund concludes that the general idea of the law of family maintenance is that the family income constitutes a fund destined to support the members of the household and that it is the primary duty of the husband to keep this fund supplied. He proceeds to demonstrate how this same notion of a common family fund dominates the law of social insurance, and in particular the practice of the National Insurance Commissioners in settling claims.

The learned author concludes that, while the various agglomerations of legal rules which make up the English matrimonial régime have never coalesced into one integrated unit, yet their combined effect suggests that English law is slowly groping its way towards a compromise between the ideas of separation and community, a compromise which will, in all likelihood, remain in a state of flux.

German law is classified as an intermediate system in that the Civil Code of 1900 established separation of property between spouses but vested community of administration in the husband, who enjoyed not only the administration but also the usufruct of the wife's property. Spouses were, however, free to contract out of this statutory régime. German matrimonial law is at present in confusion because the new Federal Constitution provided that men and women should be equal before the law and that any law conflicting with this principle should lapse on March 31, 1953. The prevailing opinion is that since April 1, 1953, the former statutory régime has been replaced by that of complete separation of property. In his interesting contribution, Herr Massfeller, a senior official of the Ministry of Justice at Bonn, explains the problems in the way of the reform of the law of matrimonial property in Germany. He examines the various matrimonial régimes which are being put forward as the new statutory régime; the community of acquests he rejects,

chiefly because of the difficulties of its joint administration (the only form of administration compatible, in his view, with the principle of equality of the sexes). He favours, not unnaturally, his own Government's draft, which avoids the need for that continuous accounting during the marriage required in any system of community. This draft proposes a system of separate property and separate administration during the marriage; but at the end of the marriage, whether by divorce or death, there is to be an equalisation between the spouses or their estates of gains made during the marriage. For this equalisation "it is only necessary to compare the assets which each of the spouses had at the conclusion of marriage with those which he has at the termination of the statutory régime." This process, Herr Massfeller considers, will be relatively simple, as he proceeds to demonstrate in a very full analysis of the terms of the Government draft.

The adoption of the Government draft would bring German law into close affinity to Swedish law where the Marriage Code of 1920 provides for separate ownership and administration during marriage, but each spouse has a certain suspended right to the other's property which matures upon the dissolution of the marriage: the property is then divided equally between the husband and wife (or their estates). Not all property, however, is subject to this division, and the spouses are free to exclude the statutory régime by marriage settlement. Professor Malmstrom's account of the Swedish law is lucidly written and of great interest. He considers the present régime to be satisfactory where the marriage tie is dissolved by death, but to be ill-adapted to the dissolution of marriage by divorce, a cause of dissolution which accounts today for 20 per cent. of dissolved marriages as against 3 per cent. at the time of the Code's preparation. He compares the situation under Norwegian law, where the judge has a discretion to modify the division of property in the light of the circumstances of the divorce.

In the United States, community property systems prevail in no fewer than eight western and south-western states: Arizona, California, Idaho, Nevada, New Mexico, Texas and Washington. In some of these the community principle relates back to the period of Spanish or Mexican rule: one reads with surprise that 37 per cent. of the population of New Mexico is still Spanish-speaking. In others, such as Washington, the community concept spread partly through proximity to the first group, especially influential California, and partly through understandable dissatisfaction with the common law rules. More recently, some mid-western and eastern states took up community in order to be able to split income for tax purposes between the spouses, but these six states soon abandoned community when Federal legislation gave the like benefit to spouses under a system of separate property. In *Matrimonial Property Law* the law of Louisiana is expounded by Professor Morrow of Tulane University, and those of the other seven states form the subject of a single paper by Professor Clark of the University of New Mexico. In addition, each of the eight states is the subject of a separate article in the Louisiana publication *Comparative Studies in Community Property Law*, which is the second book here under review. These specialised studies by various learned authors make an invaluable complement to the more general accounts to which Professors Morrow and Clark are limited by pressure of space; and they are aptly labelled "comparative" as most of them are concerned with the fascinating spectacle of a civil law concept functioning in a common law setting. This wealth of learned discussion seems to spring from a widespread awareness that all is not well within these eight community systems, although the principle of community itself is not questioned. From Professor Morrow's contribution to the Toronto publication the law of Louisiana emerges as one of extreme complexity with many areas of uncertainty and an over-abundant case law; he writes, "there clearly are many obsolete provisions, unsolved problems, and obscurities, even without consideration of possible objections to much of the well-settled positive law. Civil Code revision

is the major reform project for Louisiana." In this reform he advocates the retention of the existing community of acquests, which was adopted from Spanish law in 1808, but urges that the married woman should be given full capacity and a share in the management of the community. More detailed suggestions are made by Dr. Daggett in her well-reasoned and realistic contribution to the Louisiana publication under the title "Policy Questions on Marital Property Law in Louisiana."

The Louisiana publication concludes with an interesting article on the *projet* of the French Commission for revision of the Code Civil in so far as affects the matrimonial régime. The authors of the article are MM. Houin and Verrier, who are both members of the Commission and therefore write with authority. They describe how the Commission has accepted the need for an abandonment of the present legal régime of community of movables and acquests. To replace it three possible régimes have been canvassed: complete separation on the English model, separation of property during marriage with participation in acquests on its dissolution on the Swedish model, and the régime of community reduced to acquests, which is the one commonly adopted in present-day marriage settlements in France. The majority of the Commission favour this third alternative: *via tuta via trita*. Complete separation would mean the end of that sharing of gains which is one of the fundamental elements of the French tradition as well as an essential corrective to the restricted rights of the surviving spouse under the law of succession. The Swedish system was rejected (with reluctance, it seems), chiefly on the score that it had not undergone, at least in France, the test of experience, but also because of its complexity and of the fact that in the majority of French households the only person in gainful employment is the husband. This article is a valuable addendum to M. Ancel's paper in the Toronto publication.

To have in English two such collections of studies is a sign of the great interest which this once-neglected branch of family law is now arousing. Yet one may ponder whether this interest is altogether healthy. Granted that (in Professor Friedmann's telling phrase) "the law must take care of the pathology of human and social relations," may not their physiological functioning be the worse for legal analysis? English law, ever pathological in approach, has evolved the system of separate property, notwithstanding the community practices of the normal family household. To attempt to legalise these practices, as some writers urge and as the law itself has in some cases done, may ill serve the cause of family stability in a society unused to any systematised matrimonial régime and having even to import this omnibus phrase from a foreign language.

L. NEVILLE BROWN.

DAS STAATSNOTRECHT. Max Planck Institut. [Carl Heymanns Verlag. 1955. viii and 268 pp. DM 29.]

THE LAW OF EMERGENCY. By C. S. SUBRAMANIA IYER, B.A., B.L. [The Sundaram Iyer-Krishnaswami Iyer Endowment Lectures, 1956. The Madras University Journal. pp. 184–304.]

THESE two comparative studies of emergency powers afford a striking contrast in method, presentation, and, unfortunately, the standard of scholarship. "Das Staatsnotrecht" is a factual symposium, country by country, of the sources and contents of such powers and the methods by which their exercise may be controlled. The sections are each preceded by a table of contents and are then arranged under clearly-defined heads; the addition of a good index facilitates reference to a book which is undoubtedly worth consulting. The method of approach was to explain in brief introductions the general background of law in each country, to consider the sources, and then to give

an account of emergency powers in the different situations into which each of the countries divides its emergencies. The authors have sought to be factual rather than to comment, and this they have done admirably within the scope of two hundred and fifty pages dealing with seven countries, Belgium, France, Great Britain, Italy, the Netherlands, Switzerland and the United States.

The author of the section on Great Britain has contributed a very good account of emergency powers in this country. The only real blemish is the assertion at p. 89 that the courts have been concerned to allow freedom of action to individuals who act without foreseeing that breaches of the peace will follow. This is surely a misreading of the authorities cited (*Beatty* v. *Gillbanks*; *R.* v. *Justices of Londonderry*), and a misunderstanding of *Duncan* v. *Jones*, where only what the police officer reasonably foresaw was relevant. It should also have been pointed out at p. 72 that, although the courts do not normally question the exercise of discretionary powers where they are conferred in subjective terms, the courts have frequently insisted, *obiter*, that such powers must be exercised in good faith. It is a pity that from *Thomas* v. *Sawkins* only the wide *ratio* of Lord Hewart C.J. is quoted, for many lawyers take the view that, if this case was correctly decided, only the narrower *ratio* of Avory J. is good law. But these points of detail scarcely detract from the merits of a very useful book.

The Law of Emergency is the published version of lectures delivered under the Iyer Endowment in the University of Madras. The less serious of its defects are a regrettable number of printing errors, misspelling of the names of such well-known writers as Gutteridge, Vanderbilt and Hayek, and lapses into bad grammar. The method of presentation is to divide into parts and headings but within these the author sometimes rambles, and overloads with quotations which, when they are relevant, seem sometimes to be superfluous.

The two fundamental weaknesses of these lectures, however, are a vague and unnecessarily wide conception of emergencies and frequent lapses into muddled thinking. Emergency is defined at p. 187 to include contingencies of all character, whether temporary or permanent. That the author really means this is apparent from the inclusion among examples of statutes authorising emergency action the Bank Holidays Act, 1871, on the ground that it authorised the closing of banks. Indeed, the list itself is full of absurdities. Nor, for example, is it obvious why the remark by Cardozo J., cited at p. 202, that "when money is spent to promote general welfare, the concept of welfare or the opposite is shaped by Congress, not State," necessitates any reconsideration of the dictum that whether acts of Congress are constitutional "may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act." It is a pity that by inexplicable reasoning of this kind the author deprives himself of the harvest merited by his great industry.

Donald Thompson.

Fundamental Rights in India. By Alan Gledhill, m.a., i.c.s. (Retd.), Professor of Oriental Laws at the School of Oriental and African Studies, University of London. [London: Stevens & Sons, Ltd. 1955. xvi and 134 pp. 25s. net.]

It is usual for the United Kingdom lawyer to look superciliously upon declarations and constitutional guarantees of fundamental rights. There is some justification for this attitude. Too often a declaration of fundamental rights has proved to be nothing more than a sham or a nuisance. It is also true that guaranteed minority rights have seldom withstood a determined

assault by those who are committed to override them, and that in the last analysis the only sure safeguards of individual liberty are the self-restraint of governments and the force of public opinion. No doubt it is better to jog along without a bill of rights if one can. But what may be possible for Britain, with its unique constitutional history and its relatively homogeneous population, may be undesirable elsewhere. A partial recognition of this fact is shown by the inclusion in a number of colonial constitutions of provisions prohibiting legislative discrimination on grounds of race or religion. The Government of India Act, 1935, on which the present Indian Constitution is substantially based, embodied several prohibitions against discrimination; but they fell short of a comprehensive bill of rights, the enactment of which was, indeed, expressly rejected when the Bill was before Parliament.

What was rejected by the United Kingdom Parliament in 1935 commended itself to the framers of the Constitution of independent India. Their decision was influenced by several factors—consciousness of the massive character of minority problems in India, memories of the protracted struggle against government under British rule, acknowledgment of Gandhian ideals, of the climate of international opinion and of American experience. Those principles of governmental conduct that were not appropriate for judicial enforcement were set out as Directive Principles of State Policy. The Fundamental Rights are those principles of governmental and social conduct which were deemed to be appropriate for judicial enforcement. The means provided for enforcing them in the courts were the constitutional writs, which are based on the English prerogative writs. The Rights cover a wide field and are defined with some degree of particularity. In the majority of instances express provision is made for the circumstances in which they may be qualified or abridged. If it is provided that reasonable restrictions may be imposed on a Right in the interests of public order or morality, it is for the courts to determine whether a restriction imposed is reasonable and whether it is directed to the permitted purposes. In the result a formidable body of litigation has arisen, despite the inadequacy of provisions for legal aid for poor persons. The number of cases on the interpretation of the Fundamental Rights exceeds the number of all other constitutional cases in India. Only the keenest student can hope to keep the new Indian constitutional jurisprudence in perspective. No student is as well equipped for this task as Professor Gledhill, and he has placed us in his debt by his masterly survey of a swiftly moving scene. He shows how the courts have on a number of occasions enforced the Rights against the Legislatures and Governments of the Union and the States. He regrets the alacrity with which the decisions of the courts have sometimes been circumvented—the Constitution is easily amended, and the Union Government regards judicial review of legislation as being at best the lesser of evils—but believes that on the whole they have afforded a necessary protection to, and encouraged further respect for, individual rights. Although the courts have shown no undue deference to the will of the Legislature or the Executive, they have prudently refrained from magnifying their own jurisdiction—for example, they have refused to interpret the guarantee against deprivation of life or personal liberty "except according to procedure established by law" as introducing the American concept of due process of law into the Indian Constitution. The historian may one day conclude that the enforcement of the Fundamental Rights by an independent judiciary constituted a major stabilising element in the early years of Indian democracy.

In his Preface Professor Gledhill modestly writes that his immediate purpose was to cater for the needs of LL.M. students in the University of London. His book will certainly appeal to a far wider circle of readers —a circle that would be wider still if the price could be reduced. The book should go into further editions. The author might consider setting out the main articles of the Constitution concerning the Rights in an Appendix,

and transferring the chapters on individual constitutional writs—which, incidentally, are of considerable interests to the English administrative lawyer—to the end of the book.

S. A. de Smith.

Soviet Military Law and Administration. By Harold J. Berman and Miroslav Kerner. [Harvard University Press; London: Geoffrey Cumberlege. 1955. xiv and 208 pp. 32s. net.]

This book is the seventeenth publication of the Russian Research Center of Harvard University. Its chapters deal with Hypotheses, Soviet Military Administration, Discipline, Crimes and Punishments, Courts and Procedure and an Appraisal of the system. The main text numbers 166 pages; and, for that, 32s. is not cheap.

There is much information in this book. The authors refer to many documents and authorities. It may have great value as an introduction to someone who wishes to learn about its subject. It may have been worth writing. But I am doubtful whether those of the general public who are interested, professionally or otherwise, in the Soviet Union or in military law, will put it down with a feeling that they have learnt much. For my part, I was conscious, as I read more and more, of a growing irritation. I wanted either to be told more or to be told nothing. I felt in the end as though the authors had come across a heap of dry bones which they had assembled to see what the skeleton looked like. Their elementary knowledge of anatomy carried them this far. But what the thing looked like when it lived; what were its habits; what clothes or covering it wore; what its speech, its smell, its touch, its hearing, and its sight—none of these was revealed. Throughout the book the authors are constantly professing ignorance. Of the Council of Ministers they write: "We know very little about the actual functioning of this important body" (p. 7); other examples are: "It may be doubted whether the Presidium of the Supreme Soviet has anything more than a ministerial function in the enactment of such legislation" (pp. 5, 6); "It is impossible to ascertain with any degree of precision the effect of the Counter-intelligence Sections and informers upon the system of military administration" (p. 23); on the next page something else is "impossible to determine from official sources or, indeed, from unofficial sources available to the authors" (p. 24).

The authors are, of course, aware of their difficulty. "The gap between law in books and the law in action, familiar in all societies, is still more familiar in all armies" (p. 132). So an "appraisal" is attempted in Chapter V. After stating the difficulties, the authors admit that their impressions of the day-to-day working of the system "are derived from the fragmentary personal experiences of a relatively few people [including Mr. Kerner] and from what can be read between the lines of Soviet case reports, treatises, newspaper articles, and similar published material" (p. 128). They add "We also believe that the difficulties of an overall appraisal in larger terms do not excuse us from making such an appraisal, however tentative it must be" (p. 129). This is the crux. Personally, I feel that they, and others in similar positions in other disciplines, should be excused. That blessed word "tentative"! If the facts are not there, nor the experience to be drawn on, then assuredly the appraisal must be tentative; but by the same token it may also be unjustified and wrong-headed. Is there really, as the authors seem to think, a moral obligation to try their best? Later they write: "Any generalisations with respect to the harshness or leniency, objectivity or capriciousness, effectiveness or ineffectiveness of the Soviet system of military law

and discipline *as it is actually applied*, are of necessity based upon rough impressions. Similarly, any generalisations with respect to the docile or rebellious character of the Soviet soldier, and his attitudes towards superiors and toward the system of military law and discipline, are inevitably the product of intuitive judgment founded on fragmentary evidence" (p. 136). Instead of, therefore, abandoning the attempt to generalise, Mr. Kerner gives a "personal and informal account of his experiences gained while serving as a colonel with the Czechoslovak Army unit on the Eastern Front, that is, with the Red Army, from January 1, 1944, until the end of the war in May, 1945" (p. 137). Now these reminiscences are interesting. But from them are drawn thirteen conclusions. The first conclusion is: "Soviet enlisted men blatantly disregard some kinds of disciplinary regulations and get away with it" (p. 145). The evidence quoted for this momentous revelation, drawn from Mr. Kerner's account is: "These military drivers did not dim their lights as required; Colonel Kerner ordered the [Russian] driver Misha to go ahead but Misha nevertheless chased a hare for twenty minutes; drivers habitually stopped to drink and exchanged military supplies for homemade vodka; some offences went unpunished; traffic discipline was always very poor" (p. 145). Conclusion No. 7 is: "Generals are held in awe by all and have extremely great privileges" (p. 146) and No. 8 is: "Explicit reliance is often placed on military regulations in giving and enforcing orders" (*ibid.*); and so on.

Finally, the authors ask "two basic questions" about the Soviet military judicial system. Are the judges independent and are they honest, intelligent and able? "In evaluating the Soviet system of military courts, it is impossible," say the authors, "to give a definitive answer, and difficult even to give an approximate answer, to these two questions" (p. 158). Undeterred, they proceed to draw "some important inferences" from Soviet cases and literature and give what looks like a definitive answer to the first question: "Our answer is, not entirely—in other words, no" (p. 159).

I have tried to explain why I found this an irritating and unsatisfactory book. And my excessive use of the personal pronoun is because others may properly think that, despite the lack of real knowledge which the authors admit, a book of partial impressions is useful, helpful and justified. Within its limitations, the work has been ably and conscientiously done.

J. A. G. GRIFFITH.

THE PREFECTS AND PROVINCIAL FRANCE. By BRIAN CHAPMAN, M.A., D.PHIL. [London: George Allen & Unwin, Ltd. 1955. 242 and (index) 4 pp. 18s. net.]

IT would be a pity if lawyers should be denied the pleasure and profit of reading this book through any want of its review in legal journals. Dr. Chapman lectures on government in the University of Manchester. In his introduction he admits that his book is doubly presumptuous, being written by an Englishman about an institution peculiarly French and by a layman about problems comprehensible only within a framework of administrative law. Professional jealousy must not obscure the excellent job which he has done in tackling the constitutional and legal background, nor need French national pride resent the interest of a foreign observer as discerning and *sympathique* as Dr. Chapman.

Works on French administrative law abound in French—the reviewer must admit a preference for the treatise of de Laubadère—and in English we now have *French Administrative Law and the Common Law World* by Professor Bernard Schwartz of Yale and, in a narrower field, *Executive Discretion and Judicial Control* by Professor Hamson of Cambridge. The present work is

a most valuable supplement to these, as it tells us little about administrative law but a lot about the administration of France, especially provincial France; read in conjunction with the author's earlier work on *French Local Government*, it helps us to appreciate the machine over which French administrative courts have gained judicial control through their miraculous brain-child, *le droit administratif*.

In his new book Dr. Chapman has no less an aim than to portray the Prefectoral Corps at work and to show its place in contemporary France. To do this he divides his study into five chapters; in the first of these he sketches the historical development of the Corps from its foundation by Napoleon in 1800 until the present day, in the second he outlines the administrative background, and in the remaining chapters he follows the traditional *cursus honorum* of a member of the Corps from *Chef de cabinet*, through Sub Prefect, to Prefect.

No such comprehensive study of the Prefectoral Corps has hitherto been attempted on either side of the Channel. It would be presumptuous, therefore, for a reviewer to enter into detailed criticism of Dr. Chapman's book, based as it obviously is on an intimate and first-hand acquaintance with the day-to-day working of provincial administration. One may, however, admire the elegant style of the writer, the many and felicitous touches of humour with which he enlivens his subject, and the successful way in which he brings before the reader the Prefect (and the Prefect's wife) as a real creature of flesh and blood: thus, the Prefect must, we are told, know when, and when not, to wear his magnificent uniform; his personal conduct must be above reproach, or at least not offend against Clemenceau's motto, "*rien dans le diocèse*," for "it is fatal for a Prefect to be murdered by his mistress as was an unfortunate Prefect of Marseilles"; and he must know what *Mme la Préfète* is doing lest she cross the strings which he holds with personal and feminine issues.

The challenge of the post, Dr. Chapman concludes, is to combine thought with action. "The adventurer with a flair for impetuous leadership flags under the grind of daily administration. The meditative official, who commends himself to civil service examination boards, is very rarely equipped for sudden personal action. A good Prefect is a man who sees in administration the real source of government in the country, but who rejects, as a person, the drab anonymity of the normal bureaucrat. He is that rare bird in a civil service, the individualist."

The need for such qualities is due to the cumulative nature of the Prefect's functions. He is "the representative of the State in the Department, the delegate of the Government, the agent of all the Ministries, the *tuteur* of the Communes, and the executive head of the Department." The recruitment of suitable men is therefore of particular interest, and Dr. Chapman has some valuable comments to make on the *Ecole nationale d'administration* which the State set up in 1945 to train those destined for senior posts in the Administration.

If the French are not as proud of the Prefectoral Corps as an outside observer would expect, it is because the Frenchman needs a scapegoat for his own failings. "The essence of the French attitude to the Prefectoral Corps is that they endow its members with the vices they themselves possess, and demand from it the virtues that they, as a civic entity, lack. They know that what is lacking in French life is a social conscience and a high standard of political morality. The Prefects are expected to supply these qualities. If they fail to provide this special kind of leadership (and some do) they are branded as incompetent and perhaps dishonest. If they succeed they become the object of personal animosity, for the Frenchman, like others, does not really like the qualities which he knows he lacks."

Dr. Chapman frankly admits that the complete prefectoral "myth" is part of the French political tradition which it would be beyond the scope of his

study to unravel. Yet he goes far in this book towards turning local government in France inside out for our inspection by showing us the Prefect in the round. From these pages the Prefect emerges both as the keystone of the arch of French local government and as one of the main links which help to bind together into one nation peoples as diverse as the natives of Alsace, Brittany and Provence. Indeed, one of the chief merits of the book is its emphasis on the diversity of France, its awareness of the inherent provincialism of most Frenchmen, its firm rejection of that facile identification of France with its capital.

Anyone interested in the plight of contemporary France should read this book. It ought also to be read by those concerned about certain trends in our own pattern of public administration. For, as the author observes, "whereas the growth of national services in Great Britain has led to drastic centralisation, the French have preserved a steadier mean; in France powers can accumulate in the hands of the local Prefect; in Britain powers taken from local authorities pass automatically to a central authority, in default of a localised administrative service of tested competence." For such illuminating comparisons the student of political science and of government must stand indebted to Dr. Chapman. The comparative lawyer, too, has a great need of books such as this which vividly portray the institutional and social background of another country and so give to his own specialised study of its law a meaning and purpose which it would otherwise lack.

L. NEVILLE BROWN.

BRITISH GOVERNMENT INSPECTION AS A DYNAMIC PROCESS. By JOHN S. HARRIS. [London: Stevens & Sons, Ltd. 1955. ix and 191 pp. 25s. net.]

THIS book is concerned with only one aspect of inspection as an administrative technique, *viz.*, inspection by central government in order to supervise local authorities; it is not concerned with inspection in its impact on private citizens, and does not therefore deal, for instance, with inspection as an adjunct to or substitute for regulation by licensing. It is the work of an American university teacher of government who has studied in England this aspect of inspection.

The meat of the book consists of separate chapters on poor law, public health, education, police and fire services respectively. The pattern of each chapter is the same: an historical survey of the service, followed by an account of the present system. Most of this information is available in books already published or in the annual reports of the respective Ministries, but here and there (and especially on Education) it is supplemented by material obtained at first hand from the Ministries. In a book of this size there is obviously no space for any detailed examination of the operation of inspection in any one department; for example, the lawyer who looks for hitherto unpublished data on the inspectors who carry out local inquiries for the Ministry of Housing and Local Government will be disappointed.

The rest of the book consists of an elementary introduction on central control of local government and a conclusion which compiles a rather obvious list of the factors which contribute to the success of a system of central government inspection, *e.g.*, the number of inspectors, their skill and competence.

Not an important book, but a useful and accurate summary of one aspect of government which has not previously formed the subject-matter of a monograph.

HARRY STREET.

International Organisation. By J. P. Chamberlain. [New York: Carnegie Endowment for International Peace; London: Stevens & Sons, Ltd. 1955. vi and 173 pp. 14s. net.]

International Organisation takes its title from the name of a paper first published by the Carnegie Endowment in *International Conciliation* in 1942. It is now republished together with a paper on "International Regulation of Economic and Social Questions" by three of the late Professor Chamberlain's former pupils, Dr. Lande, Professor Lissitzyn and Professor Jessup.

The three disciples describe their purpose as being to bring the master's teachings up to date by examining the impact upon international organisation of technical change and of changes in the international society. Their own essay is divided into three sections: "emergence of the individual," "limitations of sovereign equality" and "recognition of the international organisation." Surprisingly enough, the "emergence of the individual" is not directed to an analysis of human rights and fundamental freedoms, but an examination of the various technical and non-governmental organisations that are to be found on the international stage. Many of these were already existing in Professor Chamberlain's time, and the three pupils seem to be of the opinion that the existence of organisations made up of individuals rather than State representatives is evidence of the emergence of the individual into the international arena. The general impression that remains from this essay is that of reading a catalogue, and one can only agree with the authors that "it is plain that subsequent events have not changed his [Professor Chamberlain's] basic conclusions. Rather, they afford additional illustrations of the trends which he saw and analysed."

Professor Chamberlain, in his paper, provided a survey of the machinery of international organisation in general, technical conferences, amendment conferences, administration, and the rest. Much of what he considered related to the field of communications and other matters which today would fall within the purview of ECOSOC.

While Professor Chamberlain's paper might have served a useful purpose when it was published during the Second World War by indicating the functions that might be fulfilled by international organisations after the termination of hostilities, there seems little purpose in the Carnegie Endowment having reissued it at the present time, either with or without the supplementary paper which is bound within the same covers.

L. C. Green.

Grundlehre des Völkerrechts. By Ernst Sauer. 3rd ed., 1955. [Cologne and Berlin: Carl Heymanns Verlag. xvi and 504 pp. DM. 22.]

In the Appendix to this work the author prints on some 200 pages a large number of documents bearing upon international law and its history. This leaves him with about 300 pages to fulfil the book's principal aim which is "a description of the presently prevailing positive public international law on a scientific basis" (p. v.). It is a purpose which, within the limits available to the author, it was almost impossible to achieve. Yet it is remarkable that he succeeds in telling the reader a great deal. He emphasises the idea of solidarity between States, which he desires to be understood "as an international conception that may be decisive for the further development of public international law." In this sense, therefore, the work displays a progressive tendency which is to be welcomed and which leads the author to make some useful observations on points of detail. Thus he accepts the monistic doctrine

(p. 22); he resists the tendency to give a restrictive interpretation to Art. 25 of the West German Constitution, which proclaims the primacy of international law (pp. 23, 24); he proclaims the legal efficacy of the Stimson doctrine (p. 78); he denies the possibility of annexation in breach of international law (p. 82); he describes the Declaration of Human Rights as a turning point not wholly devoid of legal effects (pp. 104, 105). It is all the more irritating that the work is interspersed with remarks which are of a frankly political character: "The German Hitler-spirit, the creation of National Socialism were possible only because insufficient *Lebensraum* was left to the aspiring German people and the return of the Colonies was withheld from it" (p. 54); "it is questionable whether Germany would have left a League of Nations which would have had the whole of the military power of the United States of America behind it" (p. 225); the principle of solidarity means that "in respect of crimes against human rights the rule of criminal responsibility must be valid. There can be no question that the Nurnberg law of Soviet type ought thereby be granted world-wide recognition" (p. 260).

Post-war Germany has not yet produced a great, modern treatise on public international law. It is to be hoped that it will soon appear. In the meantime a critical German reader will derive benefit from Dr. Sauer's introduction.

F. A. MANN.

MISCELLANY-AT-LAW. A Diversion for Lawyers and Others. By R. E. MEGARRY. [London: Stevens & Sons, Ltd. 1956. 25s. net.]

READERS of Mr. Megarry's more serious works, and those who—like the present reviewer—have attended his lectures at the Council of Legal Education, will know that he combines immense erudition with a lively sense of humour; and in this parergon he offers a wider public the fruits of both.

The author might have let his excerpts and anecdotes stand by themselves, each under its own rubric, in *Bedside Book* fashion. He has chosen the more difficult path of writing a continuous narrative; and he may therefore be forgiven if the "continuity" seems at times a little forced, and on occasion breaks down completely (as at p. 207, where the simple conjunction "And" is used to link two topics of quite disparate nature in the same paragraph).

As Mr. Megarry points to the occasional solecisms of the Bench and the legislature (pp. 33 and 202), his reviewer may be permitted to observe that he writes (on p. 344) of "the ardours of local government service" as if "ardours" were connected with "arduous," and that his use of "transpontine" (on p. 363) is not justified either by etymology or, it is submitted, by usage.

On the subject of photographs in the law of defamation (p. 199), the facts in *Garbett* v. *Hazell, Watson & Viney, Ltd.* [1943] 2 All E.R. 359 might be thought to merit inclusion in a future edition. The well-known "officious bystander" dictum of MacKinnon L.J. is quoted on p. 210; perhaps credit should be given to Scrutton L.J. for having anticipated it by many years, when he said in *Reigate* v. *Union Manufacturing* (*Ramsbottom*), *Ltd.* [1918] 1 K.B. 592, 605, "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case?' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.'"

Mr. Megarry cites (on p. 207) the famous couplet from *The Circuiteers*:

"Thoughts much too deep for tears pervade the Court,
"When I assumpsit bring, and, god-like, wave the tort."

These words are from the version printed in (1864) 5 *Notes and Queries*, p. 6; but the variant form in (1885) 1 L.Q.R. 232 (which reads "subdue" for "pervade" and "waive a tort" for "wave the tort") is surely to be preferred. The contributor to *Notes and Queries*, "An Inner Templar," wrote: "The poem which I offer was repeated to me by one remarkable for the accuracy of his memory; and by putting down what I remembered then, and hearing scraps quoted by others, I think I can give a satisfactory copy." The version in L.Q.R. contains four more lines (incidentally, the footnote on two of them,

"What fears, what hopes through all my frame did shoot
"When Frodsham's breeches, Gilbert, felt thy boot!"

deserves inclusion in Mr. Megarry's next edition), and it seems reasonable to infer, from this and from other internal evidence, that this later version was derived directly from the book of *Transactions of the Northern Circuit*, "the sacred volume" which "An Inner Templar" avowed he had not seen.

Not surprisingly, *Miscellany-at-Law* has aroused a paean of praise, and a revised impression was in print within a few months of its first publication. This review may perhaps fittingly close with a reference to a statement made on p. 366 (the page of addenda and corrigenda which has been added to the revised impression). It is not quite true to say of *Thomson* v. *Cremin* (which was originally reported—under the misnomer of *Cremin* v. *Thomson*—in (1941) 71 Ll.L.R. 1) that "the digests and textbooks seem to have ignored the case until the *All England Reports* thrust it into prominence in 1953." The learned editor of Salmond on *Torts*, Mr. R. F. V. Heuston, in his Preface to the eleventh edition (dated January 31, 1953), wrote that by "good fortune" he had learned of the House of Lords' decision in that case (he, too, was evidently unaware of the report in Lloyd's List L.R.), and it was after the publication of the new *Salmond* that the case came to be printed in the *All England Reports*.

G. Ellenbogen.

"Full Aid" Insurance for the Traffic Victim. By Albert Ehrenzweig. [University of California Press. 1954. 72 pp. $2.]

"Full Aid" Insurance for the Traffic Victim—"A Voluntary Compensation Plan." [Reprinted from the California Law Review, March, 1955. 48 pp.]

Both these publications deal with the problem of compensation for persons killed or injured by motor-vehicles, the second being a revised and shortened version of the first. Professor Ehrenzweig has made a speciality of the problem of liability and compensation for accidents. He is the author of the book published in 1951 *Negligence Without Fault* and many learned articles. About 1951 he visited Europe to study the insurance and traffic laws of West European countries.

His present publications are directly concerned with American conditions and American law. Until New York, in 1956, adopted a law for compulsory third party insurance, there was only one state in the U.S.A.—Massachusetts—which provided for compulsory third party insurance and, if the defendant did not carry insurance, it was estimated there was only one chance in four of obtaining compensation. "In December 1951," says Professor Ehrenzweig, "the millionth man was killed by an automobile in the U.S.A." In 1952 more than two million people were injured on American roads. It is rather surprising, therefore, to hear so much praise of American traffic laws. Fortunately, we are not faced in this country with the extraordinary situation which exists in the U.S.A. owing to this absence of compulsory insurance.

The misery and suffering which the absence of adequate provisions for compensation must give rise to can scarcely be imagined. There is no national health service. Unless they are covered by private insurance, the injured have to pay for their hospital and medical treatment or, if they can, to try to get it on a charitable basis.

The author discusses and dismisses a number of reforms which are regarded as alternatives to compulsory insurance. None of these are of much interest to the European reader except the Saskatchewan law. This law provides for automatic compensation for persons killed or injured in motor accidents. It provides a fixed schedule of amounts of compensation for different disabilities which is reminiscent of the schedules of disablement and benefits in the scheme of pensions for members of the forces. Every motorist is required to contribute towards this insurance and it is said that the state administers the scheme more cheaply than insurance effected by ordinary private companies. Professor Ehrenzweig does not like the Saskatchewan scheme partly, he says, because it perpetuates the negligence gamble by permitting the victim, as well as the state claiming subrogation, to bring suits in negligence. A great defect of the scheme may at present well be inadequate compensation but in time it should be able to charge higher premiums and pay greater benefits. It would, however, be politically inadvisable to advocate the Saskatchewan scheme in the U.S.A. The reason why compulsory third party insurance has been so slow in extending beyond Massachusetts is because the insurance companies have been afraid that, if it did, they would become subject to increased state regulation or even that the state might enter the insurance field. They have preferred that traffic victims should go uncompensated.

The author's rejection of the Saskatchewan scheme is also derived from his dislike of the imposition in law of absolute liability for damages upon motorists. He has a long discussion on the responsibility of the law of tort for the unsatisfactory position in the courts. In these books and his previous work he has suggested that the courts have endeavoured to deal with the problem of accidents in the modern industrial state by finding "negligence without fault" and American courts certainly seem to have extended the basis of negligence in some ways.

He does not, I think, really provide convincing objections to the imposition of absolute liability upon motorists for injuries caused in traffic accidents, irrespective of negligence, but his suggested alternative is interesting. He sets out the following six principles which he considers should govern compensation to injured persons—

1. A voluntary scheme of private insurance with minimum control by the state both of underwriting and of rating;
2. No impairment of and, if possible, an addition to existing incentives for greater safety;
3. No legislative interference with the common law or torts—but elimination of the present gamble of negligence suits;
4. Saving of expense to the insuring public;
5. Easy determination and equality of minimum awards measured by standards of low-income groups, leaving to additional optional coverage any excess requirements of those considering their potential claims greater than those offered by the scheme; and
6. Widest possible coverage of the public.

What he proposes amounts to accident insurance instead of negligence insurance. He calls it "full aid insurance."

There is an interesting law in Germany whereby the air carrier is relieved of tort liability to the extent that the passenger is indemnified under the accident policy which the carrier is under an obligation to take out on his behalf and, in Switzerland, Swissair takes out accident policies for its passengers in amounts approximating to its maximum liability against which the proceeds of this insurance may be used as a set off. If the moneys payable

to the injured persons under a "full aid" or accident policy equalled the amount, which it is generally thought to be equitable for injured persons to receive and which is awarded by the courts, public opinion might well accept the author's proposals. Certainly his "full aid" plan is fully in accordance with his six points quoted above and, if operated, private insurance of motor-vehicles should be able to continue for a much longer period than otherwise may be the case. Professor Ehrenzweig's proposal is that any motor owner or operator who carries "full aid" accident insurance for the stipulated minimum amounts should be relieved by statute from his common law liability for ordinary negligence. (He would still be liable for criminal negligence.) The plan has, of course, to provide for the owners who fail to insure and compensation in respect of their accidents would be provided from an uncompensated-injury fund. This fund would be built up by "tort fines" collected by the fund from persons causing injuries and from sufferers guilty of criminal negligence and, of course, some contribution from the taxpayer to represent the saving he would experience as a result of a reduced number of cases in court. This suggestion of tort fines is of doubtful value and is not likely to be considered here but the proposal for accident insurance to take the place of present third party insurance is a most interesting one. No one should be satisfied with the present state of English law. To say that negligence must be proved is often to require the impossible. A vital witness to a motor accident is the injured party but he may be dead. Most solicitors know too many cases where, because negligence cannot be properly proved against a motorist, inadequate compensation in the form of an *ex-gratia* payment must be accepted. If there is only the fact of an accident and it is impossible to prove any negligence at all, no compensation will be received, however great the need or hardship.

In 1932 the House of Lords debated a Bill which would have had the effect of making motorists absolutely liable to compensate persons injured in road accidents except insofar as the accident was caused by the negligence of the person injured. A Committee of the Lords in 1933 reported in favour of this Bill. It is unfortunate that the Bill did not become law since it would have greatly improved the law but it did not go far enough. There must be absolute liability to pay adequate compensation in some form to all persons injured in road accidents. The best provision would probably be a scheme based on the principles of the Saskatchewan law of state motor insurance. It could be administered by a State Insurance Bureau.

This may be politically difficult to achieve. An alternative is to make motorists absolutely liable to pay compensation for personal injuries suffered in a road accident, whether there is negligence or not, and to leave them to insure in the present way against this liability. The author's alternative, however, of a "full aid" plan should receive consideration. He suggests that pending an Act of Parliament embodying this new insurance plan, motor insurers could insert in their policies a "full aid" clause. "Under this clause, the victim of an insured car could, in his discretion, request payment to himself of benefits of the size and type outlined in the above legislative scheme, in consideration of a waiver by him of any tort claim he may have against the insured. A certain adverse selection could, of course, not be avoided. But I submit that the attractiveness of immediate payment unencumbered by the expense and delay of litigation would induce the majority of accident victims to choose this option. This expectation seems justified in the light of the experience gathered under similar plans now in operation abroad in the field of aviation insurance. In any event, the experiment should be well worth the effort since it might furnish in the most conclusive manner evidence of the feasibility of voluntary 'full aid' insurance for the traffic victim." It would be very interesting to know what English motor insurers think of this suggestion.

Robert S. W. Pollard.

ODGERS' PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE. Fifteenth edition by B. A. HARWOOD. [London: Stevens & Sons, Ltd. 1955. xxxviii and 528 pp. 50s. net.]

THE last edition of this standard work on civil procedure appeared in 1952, since when the reforms stemming from the Report of the Evershed Committee have made imperative much rewriting of the text. The new edition has been entrusted again to the care of Master Harwood, who had been previously associated as co-editor with the eleventh and twelfth editions which appeared before the last war. Users of the new edition must be heavily indebted to the present editor for the skill with which he has brought *Odgers* up to date whilst preserving so much of the verve and colour of the original. In particular he has left largely untouched the original author's chapters devoted to the art of pleading to which generations of draughtsmen must have turned for help and not been disappointed. Despite the complexity of the subject-matter the book remains eminently readable, partly through intelligent sub-heading as an aid to mental digestion, but chiefly by reason of the fullness of illustration culled from actual cases. These illustrations put flesh and blood on the bare bones of procedure to be found coffined in the cubic capacity of the White Book.

The recent changes of procedure are mainly dealt with in Chapter 3 ("The Writ and its Endorsement") and Chapter 17 ("The Summons for Directions"), but the whole text shows careful and thorough revision. There are very few misprints; but (without being exhaustive) "appearance" is mis-spelt on p. 77 (line 20), "form" should be "from" on p. 113 (line 26), "object" should be "objection" on p. 129 (line 27), and the first case reference on p. 162 should be to (1888) 59 L.T. 888.

Odgers is such a tried favourite that a lengthy review would be as tedious as unnecessary. It would also be impertinent to seek to correct in his law and practice an editor so versed in procedure as Master Harwood. One may, perhaps, regret that the implications of legal aid were not more fully discussed and that more was not said of the procedure for joining a third party (a matter discussed in some detail in the Evershed Report).

The book is well produced, although its pea-green binding is only slightly more practical than that of the *Annual Practice*, the white cloth of which so soon becomes dirty linen in the rough and tumble of practice.

L. N. B.

AN OUTLINE OF THE LAW OF RATING. By WILLIAM SCRIVENS, M.A., LL.B., and K. F. GOODFELLOW, M.A., LL.B. [London: Sweet & Maxwell, Ltd. 1955. xix and 147 and (index) 4 pp. 22s. 6d. net.]

THIS book, based on a series of articles which first appeared in *The Conveyancer*, provides in a short space and with admirable clarity a good general account of the law of rating. It can be recommended confidently to anyone who, not being already an expert in this very complicated subject, is about to make a special study of it or wants an overall picture before using one of the fuller standard works.

LEOLIN PRICE.

Sécurité Collective en Europe. Polish Academy of Sciences. [Warsaw: Panstwowe Wydawnictwo Naukowe. 1955. 493 pp.]

An international conference devoted to Collective Security in Europe was held in Warsaw under the auspices of the Polish Academy of Sciences from April 3–6, 1955, between the Foreign Ministers' Conference at Berlin in February and the Summit Conference at Geneva in July, 1955.

The Conference was attended by representatives of the Soviet Union, the Peoples' Democracies, Eastern Germany, China and "of certain Western countries, Belgium, France and Great Britain." No Yugoslav speaker took part in the proceedings, and the only English speaker was Mr. Geoffrey Bing, Q.C., M.P. Mr. Bing spoke on the situation in the Far East, with particular reference to Formosa and the Pescadores. His object was to prove that the legal title to these territories passed to China from the moment of the Japanese surrender, at the latest. He maintained, correctly, it is submitted, that the nature of the Government of China was irrelevant, pointing out that it was impossible in law to contend that they belonged to China so long as Chiang Kai-shek was in power, but ceased to do so when the Communist régime took over.

A conference such as this serves no real purpose other than to provide grist for the political mill, even though it be in juridical terms. To a great extent the presence of Western representatives only serves to lend the appearance of respectability, and the report of the proceedings of the Warsaw Conference seems to reiterate this suggestion.

L. C. Green.

Industrial Law. By J. L. Gayler. [London: English Universities Press, Ltd. 1955. 362 pp. 30s. net.]

The important field of industrial law is not richly served by works of general coverage. Mr. Gayler's book is indeed only the second of up-to-date works of this kind. It is a clear exposition of the law written at a rather elementary level of interpretation.

Under the heading of "The Common Law" the first Part deals with the contract of employment and implied duties therein of employer and employee and with the employer's duties to take reasonable care for the safety and health of his work-people as well as the application to employment of the tort of breach of statutory duty.

It is a mark of the elementary level of the discussion that, in recounting the onus and nature of proof of causation in an action for breach of statutory duty, the learned author is content to state without citation or question the rule in *Vyner* v. *Waldenberg* [1946] K.B. 50, at a time when *Watts* v. *Enfield Rolling Mills* [1952] 1 All E.R. 1013, had already been reported. It is hoped that in the next edition due attention will be paid to the reversal of *Vyner* by the House of Lords in *Bonnington Castings* v. *Wardlaw* [1956] 2 W.L.R. 707.

Part II is concerned with trade unions, collective bargaining and the settlement of disputes. This undoubtedly is the best section of the book —a fact of particular importance for law teachers, since the analysis of "Collective Labour Law" is probably the slightest and least good part of Professor Mansfield Cooper's work. It is, however, regrettable that, from a legal viewpoint, Mr. Gayler should attempt to equate collective agreements with commercial contracts (pp. 172–174), for it indicates a total misunderstanding of the voluntary structure of industrial relations in this country;

but here is not the place to discuss this fundamentally important topic or to consider the internal evidence in collective labour law which militates against the learned author's facile generalisation.

Parts III, IV, V and VI outline in simple and readable fashion the main matters concerned with the Factories and Shops Acts, wages legislation, "Mobility of Labour" and social insurance. Perhaps for a future edition the learned editor might reconsider the relevance to the mobility of labour of the employment of disabled persons and the reinstatement of national servicemen in civilian employment.

By and large Mr. Gayler's book does no more than repeat material to be found scattered through other works but its particular value for the student of industrial law is that what is scattered through other books is here drawn together into a single volume.

C. GRUNFELD.

LAW AND PRACTICE OF BUILDING CONTRACTS, INCLUDING ARCHITECTS AND SURVEYORS. By DONALD KEATING. [London: Sweet & Maxwell, Ltd. 1955. xliv and 266 and 7 appendices and index. £2 10s. net.]

THIS book is intended for both lawyers and laymen, and although the emphasis has been placed upon matters peculiar to building contracts, the author has lightened the task of laymen by providing an outline of the general law of contract.

Formation of the contract is dealt with in a reasonably full manner, although consideration has been omitted. This is not perhaps of great significance since the majority of building contracts are under seal. The principle laid down in the *High Trees* case is, however, referred to in a footnote, and the reader is referred to the standard works on contract. Mistake, too, is not discussed, the author pointing out that there does not appear to be a reported case on mutual mistake arising out of a building contract, but the reader is informed of the existence of the equitable remedy of rectification. This treatment of the general law of contract is necessarily brief, the author contenting himself with setting out the propositions of law; there is little space to spare for illustrations and examples.

In a discussion of capacity the reader is warned against entering into a building contract with an infant. The reasons given for this warning are that it is doubtful whether such a contract is a contract for necessaries, and that because an infant cannot hold a legal estate in land he may be unable to grant possession of the site. Although one may respectfully agree with this warning, a better reason may be proffered, that an infant is not liable upon an executory contract, and the contractor may therefore find it necessary to wait until completion before any claim to payment arises.

The canons of construction often present difficulty to laymen, who cannot see, for example, why evidence of preliminary negotiations cannot always be given in order to explain their written agreement. The chapter on the construction of the contract is particularly lucid.

In discussing the right to payment the author analyses the three ways in which this right may arise; that is to say, under a lump sum contract, under any other express contract, and upon a *quantum meruit*. The case law on this subject is difficult to handle and of limited value even when skilfully managed, since each one of the reported cases naturally turns upon its own particular facts. Although uncertainty has been greatly reduced by the use of standard forms, it is of course important for the layman to realise fully the legal consequences of using a set form of words. But where

a standard form of contract is not used, the layman is warned by these cases of the dangers of imperfectly expressing his intentions. The reader's task has been simplified by the author, who in addition to setting out what rules can be gathered from the cases has set out a "summary of position" in a convenient manner.

If building contracts always proceeded directly to completion, the book would end with the chapter on employer's approval and architects' certificates. But the author takes the reader through the topics of variation, default, remedies, assignment, and bankruptcy and death. The book ends with a discussion on the powers and duties of architects, engineers and quantity surveyors.

The layman will find this a concise and lucid guide. The lawyer will welcome it for its quotation of authorities, which are fairly numerous if not copious, for an invaluable glossary of building terms, and for useful notes on various standard forms of contract set out in the appendices.

Allister Lonsdale.

Show Business and the Law. By E. R. Hardy Ivamy. [London: Stevens & Sons, Ltd. 1955. 25s. net.]

The author states in his Preface: "I have tried to write in a style which will readily appeal to a wide public. In particular I had in mind the need of the film producers and distributors, the theatre and cinema managers, the artistes and their legal advisers for an up-to-date work on this subject."

In putting legal advisers last, the author has evidently complied with the aim of the publishers, who have presented this book in a style unfamiliar to lawyers. For the end-papers seem to reflect the colourful gaiety of Shaftesbury Avenue rather than the etiolated austerity of Chancery Lane; the dust-cover advertises a publication entitled "The Varnishes of the Italian Violin-Makers"; and the brochure which was circulated to publicise the work looks rather like a *Palladium* handbill.

It may well be that the book is none the worse for this. At the same time, the legal reader should take the hint that it does not primarily cater for him.

Thus the emphasis is on such matters as standard forms of contract (for the stage, films, music hall, circus, radio and T.V.), licences, censorship, entertainment duty, and the registration, quota arrangements and distribution of films. There are chapters of more general legal interest on the management's responsibility towards its employees, the relationship between management, audience and third parties, and copyright; but one looks in vain for any treatment of defamation, and no reference is made to a number of questions of considerable legal import, such as when a performer is a servant and when he is an independent contractor. The author has, however, gathered a great deal of unfamiliar material into a small compass, and within the limitations implicit in its purpose his book is as useful as it is interesting.

On page 39, the ruling of the trial judge in *Naismith* v. *London Film Productions, Ltd.* [1939] 1 All E.R. 794, is misstated. *Mankin* v. *Scala Theodrome Co., Ltd.* [1947] K.B. 257 is cited as the case of a performer who recovered damages from the theatre occupiers when his foot was injured through the defective condition of the stage flooring. No mention is made of the more interesting point in the case, *viz.*, the successful claim of his employer for damages for loss of services. But this was perhaps a providential omission; for it has now become clear, from the recent case of *Inland Revenue Commissioners* v. *Hambrook* [1956] 3 All E.R. 338, that on this point *Mankin's* case was wrongly decided, and that the action *per quod servitium amisit* will not lie at the suit of a theatrical employer.

G. Ellenbogen.

HIRE-PURCHASE LAW. Second Edition. By R. ELSE-MITCHELL, LL.B. [Sydney: The Law Book Co. of Australasia Pty Ltd. 1955. xvi and 126 pp., Appendix of Forms, Index. £2 10s.]

THE first edition of this book appeared in 1941 and the second edition has been made necessary by the amendments included in the Hire-Purchase Agreements (Amendments) Act, 1955 (N.S.W.). The purpose of the recent amendments was to ensure that minimum deposits were made by purchasers; these provisions were required by economic conditions in Australia.

The greater part of the book is taken up by the text of the sections of the Act followed by notes on each section. It contains much of interest. For example, there are discussions of the various methods by which hire-purchase transactions are financed, the possibility of conflict between the Sale of Goods Act and the hire-purchase legislation, the rule in *Helby* v. *Matthews* and the right to rescind a contract on the ground that an innocent misrepresentation has been made.

The book is intended primarily for lawyers in New South Wales, but as the comparative table of hire-purchase legislation shows there are many provisions of the New South Wales Act that are similar to legislation of the United Kingdom, New Zealand and the other Australian states. The book is, therefore, of more general interest. It is surprising, in view of the fact that much of the Australian legislation is based on the New Zealand Hire-Purchase Act, 1939 that so few New Zealand cases are cited, but perhaps the explanation is that the Act has seldom come before the New Zealand courts for interpretation. There is an encouraging number of references to periodical literature. It would have been useful if there had been some illustrations of the manner in which the formula is applied to determine the balance due to vendor or purchaser. The citation of cases could also be improved and there are a few printing errors that escaped the proof reader.

The book will find a ready sale in Australia where the appendix of forms prepared by the author will be found most useful. Others may be reluctant to purchase the book by reason of its relatively high price.

J. F. NORTHEY.

EMPLOYER'S LIABILITY. Third Edition. By JOHN MUNKMAN, LL.B., of the Middle Temple, Barrister-at-Law. [London: Butterworth & Co. (Publishers), Ltd. 1955. lxiii and 454 and (index) 41 pp. 35s. net.]

THE enactment of the Mines and Quarries Act, 1954, replacing as it does the Coal Mines Act, 1911, and parallel regulations concerning metalliferous mines and quarries, is the principal justification for the emergence of the third edition of this work. With so much of the law relating to employers' liability based on the interpretation of safety codes, major revisions of which are exceptional events, the need for bringing this book up to date was apparent and, let it be said at once, the task has been performed very competently. An important lapse, however, concerns the treatment of the change introduced by section 159 of the Mines and Quarries Act, 1954, in the standard of liability for breach of statutory duty. In addition to resolving the doubts expressed in *Harrison* v. *N. C. B.* [1951] A.C. 639 by making a mine or quarry owner liable irrespective of whether the statutory duty is personal or one which is expressly imposed upon an employee such as a manager, deputy or shot-firer, the section also substitutes the more stringent defence that "it was impracticable to avoid or prevent the contravention"

for the former escape clause in section 102 (8) of the Act of 1911 which merely required the defendant to prove "that it was not reasonably practicable to prevent the breach." To suggest, as the learned author does (p. 340), that where the duty of complying with the Act rests on a subordinate the owner need only show that it was not reasonably practicable for the subordinate, his agent, to avoid or prevent the breach, is an abortive attempt to maintain a distinction which was abolished under the terms of section 159 of the Mines and Quarries Act, 1954. It is noteworthy that the authority cited by the author in support, *Yelland* v. *Powell Duffryn Associated Collieries, Ltd.* [1941] 1 K.B. 154, is a decision based on the old formula in the Coal Mines Act, 1911.

Compared with the earlier editions there is discernible a greater readiness to refer to articles and notes in the periodicals and the author's choice may be described as judicious. Less satisfactory is the author's complacency in enunciating, without any qualifications, the doctrine that the relationship of master and servant is judged simply according to whether the master can tell the person employed not only what to do but also how to do it (pp. 61–62). The possibility of distinguishing between controlling, what has been described as, the "where," "when" and "what" as opposed to the "how" aspects of a person's work is ignored by Mr. Munkman, who is content to base vicarious liability on the employer's right, in the last resort, "to exercise detailed control over the way in which the work is done" (p. 62).

Adherence to the deep-rooted "control" test, as explained in this book, may well be justified as still best suited for determining certain labour relationships, but it is doubtful whether *Cassidy* v. *Minister of Health* [1951] 2 K.B. 343, one of the only two authorities cited, is a particularly apt illustration. As Professor Kahn-Freund has pointed out ((1951) 14 M.L.R. 504) to say of a skilled engineer or toolmaker, or indeed a member of the medical staff of a hospital, that the employer controls the manner of performance of his work "is unrealistic and almost grotesque" (*ibid.*, 506). Some test more appropriate to the changed conditions of modern industrial society would seem to be called for, and something along the lines of the formula "does the person form an integral part of the employer's organisation" has been mooted in such cases as *Stevenson, Jordan & Harrison, Ltd.* v. *Macdonald* [1952] 1 T.L.R. 101, 111, and *Bank voor Handel* v. *Slatford* [1953] 1 Q.B. 279, 295. Some of the weaknesses in this alternative formula are adverted to in (1954) 17 M.L.R. 547, 550, but this is not the place to consider in detail the case for and against the respective tests. What is expected, perhaps not unreasonably, in a book devoted exclusively to the subject of employers' liability, is a more thorough treatment than that hitherto accorded to this fundamental problem.

J. Ll. J. Edwards.

The Rule Against Perpetuities. By J. H. C. Morris, D.C.L., Barrister-at-Law, and W. Barton Leach, LL.B., of the Massachusetts Bar. [London: Stevens & Sons, Ltd. 1956. xlvii and 327 pp. and index. 15s. net.]

In this book Dr. Morris and Professor Leach, writing for readers with some knowledge of property law, have sought to expound the law concerning perpetuities, to illustrate the working of the Rule in a modern environment, and to offer constructive criticism where it seems to fall short of the present needs of society (Preface, p. v). They have cited all relevant English, Irish, and Commonwealth authorities and many "praiseworthy" American decisions —well over 1,000 cases in all; various statutory provisions are printed in

Appendices. The examples in the text take the form of some 200 "Illustrations" (in the manner of the American *Restatement of the Law of Property*) based on actual or typical situations. This technique proves particularly well suited to the subject, for the Illustrations are a most vivid and valuable feature of the work. The result of all this is an erudite and fascinating exposition which traces a clear and unmistakable path through the complexities of the Rule. This book should quickly become the English counterpart of Gray on *Perpetuities*. The ample guidance provided for the practising lawyer is worth stressing, because the authors deliberately focus much of their own and the reader's attention on shortcomings of the Rule and possible reforms. Nevertheless they are scrupulous in distinguishing between statements of settled law, submissions on unsettled law, and suggestions for reform. Law is sacred, comment is free.

The introductory chapter, chiefly concerned with the history and rationale of the Rule, deals also with its application in the Conflict of Laws. One would have liked to see Construction and the Rule (another preliminary question) included here, too, rather than in Chapter 9, for it is also closely connected with problems of Vesting, which are clearly outlined in Chapter 2. The working of the Rule in relation to family settlements and wills, charitable gifts and various miscellaneous interests is discussed in Chapters 3–8. Chapters 10–12 deal with the rule in *Whitby* v. *Mitchell* and *cy-près* before 1926, Accumulations (a particularly full and careful study) and Trusts for Non-Charitable objects. The following matters among many worthy of notice, will demonstrate the quality of the discussion:— the suggestion that, where a testator knows a particular individual to be incapable of begetting or bearing children, there is open to the courts a constructional escape from the conclusive presumption of fertility, on the lines of the cases on illegitimacy such as *Re Wohlgemuth* [1949] Ch. 12 and *Re Gilpin* [1954] Ch. 1 (pp. 76–79); the excellent Chapter 4 on class gifts; the constant demonstration of the virtues of section 163 of the Law of Property Act, 1925; the view that the validity of limitations following void limitations is really to be determined not by "dependency," but by their own intrinsic validity turning upon the words introducing them (pp. 165–170); approval of the disputed decisions in *Re Churston* [1954] Ch. 334 and *Hopper* v. *Liverpool Corporation* (1944) 86 S.J. 213 (pp. 129 and 205); submission of the American view that, as regards interests under revocable settlements and interests in default of exercise of a general power of appointment, time runs from cessation of the power to revoke or appoint, on the ground that so long as the owner of a present interest can destroy a future one the latter is not within the Rule (see pp. 56, 189, 216, 232). This last point which does not seem to be taken in other English books (*e.g.*, Halsbury, Key & Elphinstone, Jarman) is perhaps open to argument; first, the property is in fact tied up from the date of the original settlement (*cf.* the reasoning in *Re Churston*, *supra*) and, secondly, interests in default of appointment are usually vested, and so valid where the power or its exercise is too remote, simply because they derive from the donor and not the donee of the power. Incidentally the authors accept the division of powers as general or special according to their object and then allocate "hybrid" powers to one or other group (pp. 127–130); Professor Fleming's reclassification into unlimited and limited powers (see (1948) 13 *Conveyancer* (N.S.) 48) might have been discussed, for it provides a test applicable to all powers whatever the mode of restriction of exercise.

Even an indulgent editor of the *Modern Law Review* could not possibly provide space for a complete survey of the review of the modern law of perpetuities contained under the head "critique" in each chapter. There is much grist for the mill of the Law Reform Committee. Only some major points can be mentioned. Dr. Morris and Professor Leach find the existence of the Rule against Perpetuities necessary to hold the balance of power

evenly between successive generations (p. 17); they discount the problem of tying up capital because of the form of modern discretionary settlements, coupled with statutory powers of sale and wide investment clauses (pp. 16–18); these reasons are perhaps a little cursory, for trustees can neither risk capital nor give it away. The working of the Rule comes under heavy fire; aspects attacked are:— the requirement of certainty of vesting from the outset, with a characteristic plea for a "decree of divorce from fertile octogenarians, unborn widows, precocious toddlers, magic gravel pits, unappointed lieutenant-colonels, and other enormities as yet unimagined" (p. 86); the "all-or-nothing" rule in class gifts (pp. 118–125); invalidation turning on the use of one form of words rather than another, and initial construction without reference to the Rule (pp. 25–28, 239–247; *cf. Re Legh* [1938] Ch. 39); the "Royal lives" clause and the addition to lives in being of 21 as against 25 or 30 years (pp. 66–68); the application of the Rule in its present form to commercial as well as family interests (Ch. 8).

Whether all these matters are evils and, if so, what remedies are appropriate, are of course matters of opinion. The suggestion that (following the Massachusetts Perpetuities Act, 1954) certainty of vesting should not be determined till cessation of the lives in being seems an excellent one (pp. 86–89); so does that of rebuttable presumptions of incapacity to bear children after the age of 52 or before that of 14 (p. 81). On the other hand the proposal for a *cy-près* jurisdiction (pp. 34–35) seems open to objection not merely because, as the authors suggest, judges might not like it, but because of the impossibility even in simple cases of ascertaining the testator's intention. Even if it be agreed that the choice of lives in being should, ideally, be limited one may yet demur to the proposition that "the magnitude of the task which would confront the parliamentary draftsman is no reason for not attempting it" (p. 67). Again, so long as a complex structure of interests in property is possible—a matter often regarded as one of the principal merits of our law—much must turn on the precise use of words by skilled and learned draftsmen. Nevertheless Dr. Morris and Professor Leach amply sustain the main count of their indictment, that the Rule against Perpetuities has become too complex and, in fact, too difficult for satisfactory working. (If this conclusion be doubted, let the reader consider, for example, *Re Churston, supra* and *Leong* v. *Chye* [1955] A.C. 648 at the end of p. 666, or the scores which might be returned if The Law Society's *Gazette* based one of their "how-good-are-you-at-your-job" quizzes on a selection of the authors' Illustrations.) Finally, this book performs the further service of preventing that complacency concerning the existing law which is an occupational risk among lawyers. It will encourage the long process of keeping the law of property attuned to social needs. It should be read by practising and academic lawyers alike.

Since the above review was written the Report of the Law Reform Committee on the Rule against Perpetuities has been published (Cmnd. 18). The Committee acknowledge help received from Dr. Morris personally and from Professor Leach through his writings, and by their recommendations bear witness to the soundness of most of the views expressed in the book.

F. R. Crane.

Public Law—The Constitutional and Administrative Law of the Commonwealth. Edited by J. A. G. Griffith. [London: Stevens & Sons, Ltd. Spring-Summer 1956. 192 pp. Annual subscription £2 2s., single parts 12s. 6d.]

We are very glad to welcome this valuable addition to the still inconsiderable number of British legal periodicals. No branch of our law has expanded more rapidly of recent years than has public law, and in no branch have

the new developments been more important: particularly of course on the administrative side. While we of the *Modern Law Review*, and indeed the editors of other periodicals, have endeavoured to provide space for the discussion of the more important aspects of this growth of public law, all thoughtful lawyers have been conscious for some time that a systematic regular survey was really needed. The profession should be grateful to Messrs. Stevens for having made this possible, for having secured the services as editor of Mr. J. A. G. Griffith, whose contributions in the field of administrative law in recent years have been outstanding, and for having obtained for him the support of a distinguished editorial board, representative of all branches of the profession and of most parts of the British Commonwealth.

Public Law starts as it were with a bonus issue, in the shape of a double number of almost 200 pages. This was required to give room to a contribution some 100 pages in length by Sir Carleton Allen Q.C. on Administrative Jurisdiction, characteristic of its author in both style and content. It also contains a valuable article on Councils, Ministers and Cabinets in Australia by Professor Geoffrey Sawer, of the Australian National University.

Apart from articles the review contains a section of comments on current matters, and a very useful survey of recent public law material from all parts of the Commonwealth, analysed under a number of appropriate headings. It has a section for book reviews, and, an unusual feature, an index to this single number.

Mr. Griffith has set himself a high standard to live up to in future issues.

C.

BRITISH TAX REVIEW. Edited by G. S. A. WHEATCROFT. [London: Sweet & Maxwell, Ltd. 112 pp. Annual subscription 30s.: single parts 10s.]

WE also welcome the first number of a periodical devoted to tax problems. This severely technical and specialised subject has received but scanty attention from the legal academic world in this country, or from those practising lawyers who take a scientific interest in legal problems. This has certainly been a mistake and is no doubt one of the reasons why our tax law is in such an unintelligible and chaotic condition.

Among the few who have of late years been making a contribution to the rectification of this deplorable situation is Master G. S. A. Wheatcroft and the fact that he is editor of the new review is a guarantee that progress towards a systematic and intelligible survey will be made in its pages.

This first number contains some sixty pages of articles, including a lively discussion of *British Transport Commission* v. *Gourley* which has so effectively set the cat among the pigeons: two special articles on the Budget and Finance Bill, 1956: notes on the more important recent decisions (mostly very brief): a review of N. Kaldor's recent book on an Expenditure Tax: and a number of items of current tax intelligence: altogether a great deal of meat in such a small package.

C.

THE REGISTRATION, MANAGEMENT, AND WINDING-UP OF COMPANIES IN SOUTH AFRICA. By DAVID SHRAND, M.COM. A.S.A.A., C.A. (S.A.) and A. A. F. KUTON, B.A., LL.B., Assistant Registrar of Companies. [Cape Town: Juta & Co. Ltd. 1956. ix and 303 pp. £3 6s.]

THIS book, the product of collaboration between an accountant and a lawyer, both obviously well acquainted with company practice, is intended to assist practitioners in the preparation of company documents, to guide the officers of companies in the performance of their duties and to explain the application

of the provisions of the South African Companies Act and Income Tax Act. It does not purport to be a work of deep scholarship but is essentially—and successfully—practical in its approach. It should prove indispensable to company secretaries and useful to lawyers and accountants. It will also be valuable to English practitioners who are in any way concerned with South African companies, enabling them to ascertain with ease the major respects in which the South African legislation and practice differ from those of the United Kingdom. The authors are to be congratulated on a worthwhile project well carried out.

A Manual of American Copyright Practice for Writers, Publishers and Agents. Second Edition by Margaret Nicholson. [New York: Oxford University Press; London: Geoffrey Cumberlege. 1956. x and 273 pp. 45s.]

Those who have used this American book in the past will need no recommendation to the second edition which has now appeared, revised in the light of the long-awaited and more-than-welcome ratification by the United States of the Universal Copyright Convention. Those who have yet to make its acquaintance can be assured that they will here find an admirably clear and helpful guide to the intricacies of American copyright practice. Nor, despite the title, need English lawyers think that they should ignore it when called upon to advise their literary clients. This book will not enable them to get away with anything so rash as posing as experts on the knottier points of American copyright law but it will enable them to advise authors and publishers how to avoid becoming entwined in those knots. This book seems to me to be a model of what a practice manual should be. I wish we had an equally useful book on English practice.

L. C. B. G.

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